

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA  
HARRISBURG DIVISION

RICKY A. SHAW, : CASE NO.  
Plaintiff : 1:09-CV-00359  
vs. :  
CUMBERLAND TRUCK :  
EQUIPMENT COMPANY, : Harrisburg, PA  
Defendant : 19 May 2011  
.....: 9:05 a.m.

TRANSCRIPT OF CIVIL JURY TRIAL, DAY 4  
BEFORE THE HONORABLE CHRISTOPHER C. CONNER  
UNITED STATES DISTRICT JUDGE

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**I N D E X**  
**Ricky Shaw vs. Cumberland Truck Equipment Co.**  
**1:09-CV-00359**  
**Civil Jury Trial, Day 4**  
**19 May 2011**

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## P R O C E E D I N G S

THE COURT: Good morning. Please be seated.

MS. SALTZ: Good morning, Your Honor.

THE COURT: Good morning. Ladies and gentleman of the jury, we have a fairly definitive schedule for you this morning. We have one additional witness who will be testifying by video tape. It is Dr. Oplinger testifying on behalf of the defendants in this case. Then we'll take a break of about a half an hour while I meet with counsel to go over closing arguments and the charge, and then we'll return, have closing arguments with you presented by counsel, followed by my instructions on the law. All of this will take some time, but I anticipate that this case will be in your hands around lunchtime. All right? Ms. Saltz, at this time if you want to present Dr. Oplinger's testimony?

MS. SALTZ: I do, Your Honor, thank you.

(Video deposition of Dr. Oplinger played from 9:05 to 9:54 a.m.)

THE COURT: Ladies and gentlemen, that concludes the deposition video taped deposition, Ms. Saltz, do you have any additional evidence?

1 MS. SALTZ: Yes, Your Honor. I would like  
2 to move in certain exhibits at this time.

3 THE COURT: Certainly.

4 MS. SALTZ: These are the exhibits that were  
5 referenced with Dr. Oplinger. Defendant's 26,  
6 they're out of order here, Defendant's 25.  
7 Defendant's 27, Defendant's 24, 28, 29, 30, 31,  
8 32, 33, and 34.

9 THE COURT: Any objections?

10 MR. CROCENZI: I have one objection, and  
11 that is to Exhibit 24. Relevancy, Your Honor,  
12 I raised during the deposition.

13 THE COURT: Counsel, would you approach?

14 (Side bar at 9:54 a.m.)

15 THE COURT: The nature of your objection?

16 MR. CROCENZI: Relevancy, Your Honor,  
17 because first of all relevance because the legal  
18 standard is could he do the essential functions  
19 in February when CTE told him to stop working on  
20 2-26-07. This is April 12th of 2007. And  
21 furthermore the short-term disability process  
22 only started because Cumberland Truck engaged in  
23 what we believe is discriminatory acts, put him  
24 out of work, we've already had a bunch of  
25 testimony that he felt that he had no choice at

1 that point but to begin the short-term  
2 disability aspect. So to take a phrase from  
3 criminal procedures, the fruit of the poisonous  
4 tree.

5 THE COURT: All right. Ms. Saltz?

6 MS. SALTZ: On this one the company was not  
7 aware of this document. However, Mr. Shaw was  
8 aware and testified to the restrictions based on  
9 this document. This is relevant because it's  
10 relevant to the fact of Mr. Shaw's physician  
11 regarding accommodation, the company continued  
12 to send him for evaluations to return him back  
13 to work. At any point in time based on this he  
14 could have sought different accommodations, he  
15 chose not to, and the reason being is that he  
16 knew that the reason he could not seek  
17 accommodations is because his own doctor stated  
18 that he could not do the work. I think it's  
19 extremely relevant in this case.

20 THE COURT: I'm going to admit the exhibit.  
21 My concern about this is that there may be some  
22 jury confusion with respect to what it is  
23 exactly that Dr. Oplinger was certifying in this  
24 document, and it goes back to that whole idea of  
25 the whole concept of disability under the ADA

1 versus social security. This is short-term  
2 disability. So I'm disinclined to send it out  
3 with the jury.

4 MS. SALTZ: That's fine.

5 THE COURT: But I do think it should be  
6 admitted for purposes of the record, and that  
7 doesn't preclude you if you need to to refer to  
8 it in your closing arguments.

9 MS. SALTZ: That's agreeable, Your Honor.  
10 Thank you.

11 THE COURT: All right? We're going to take  
12 a break. I'm going to send the jury out. Do  
13 you have anything else?

14 MS. SALTZ: I just have one more exhibit I  
15 need to move in.

16 THE COURT: Oh, all right.

17 (Side bar concluded at 9:57 a.m.)

18 THE COURT: Ladies and gentlemen, I've  
19 overruled the objections and Exhibit 24 is  
20 admitted.

21 MS. SALTZ: Just one last housekeeping  
22 matter, Your Honor. After Mr. Staller's  
23 testimony I just would like to admit for the  
24 record his report, which is D-44.

25 THE COURT: All right. Any objection?

1 MR. CROCENZI: No objection for the record.

2 THE COURT: For the record it is admitted.

3 Ms. Saltz, do you have any additional witnesses?

4 MS. SALTZ: No, Your Honor. That concludes  
5 the defense case.

6 THE COURT: All right. And is there any  
7 rebuttal?

8 MR. CROCENZI: No, Your Honor.

9 THE COURT: All right. The record is  
10 closed. Ladies and gentlemen, at this time as I  
11 indicated we'll take a recess for approximately  
12 one half hour so that I can review the closing  
13 arguments and the instructions on the law with  
14 counsel. It may be a bit more than that in  
15 terms of our timing, but obviously we'll be  
16 working in here as quickly and getting the case  
17 to you as quickly as we can. We're in recess  
18 with the jury at this time. Ms. McKinney, you  
19 may escort the jury. Again please recall all of  
20 my earlier instructions and do not engage in any  
21 conversations until you have received the  
22 closing arguments and my instructions on the  
23 law. Ms. McKinney?

24 (Jury recessed at 9:54 a.m.)

25 THE COURT: Please be seated. If the

1 parties would like to take a break you certainly  
2 can. I'd like counsel to stay so we can go over  
3 the charge, but feel free, Mr. Shaw and Ms.  
4 Hoffman, to walk in and out at your leisure. I  
5 presented counsel last evening with the court's  
6 proposed charge. Again my apologies, I am under  
7 the weather, and under the circumstances I'm  
8 going to allow the jury to continue  
9 deliberations this afternoon, but only until  
10 about 5:00.

11 I think I need to call it a day at 5:00, so  
12 that if they have not concluded their  
13 deliberations by that time I'm going to bring  
14 them back tomorrow morning. I just want to give  
15 you that heads up, but I'm also going to alert  
16 the jury to that time frame, recognizing of  
17 course that I'm going to emphasize to them that  
18 it is not intended in any way, shape, or form as  
19 a restriction on the length of their  
20 deliberations.

21 All right, counsel, you've had an  
22 opportunity to review the court's proposed  
23 charge. As I indicated the elements of the  
24 claim and the defenses are set forth really in  
25 the twenty pages between page 12 and page 32.



1 There is one issue that I would like to address  
2 with counsel before I hear from counsel about  
3 your concerns, and that is the defense of  
4 undue hardship. You've asked for that charge,  
5 Ms. Saltz, it is on page 38 of your proposed  
6 instructions, but I'm not sure I heard anything,  
7 I'm not sure that that's really a defense that  
8 you're relying on in this case.

9 I know it's a fairly standard, almost  
10 boilerplate defense that is presented in the  
11 form of jury instructions in cases under the  
12 Americans with Disabilities Act, but your  
13 defense seems to be related to other issues and  
14 I don't believe that undue hardship, really your  
15 defense is he's not a qualified individual among  
16 other things.

17 MS. SALTZ: Right.

18 THE COURT: But I don't believe that undue  
19 hardship is something that you've attempted to  
20 develop in the record, is that correct?

21 MS. SALTZ: That is correct. I think the  
22 problem with that is that because our position  
23 has been he never sought accommodation, so if  
24 you don't seek accommodation you can't really  
25 address undue hardship in that regard.

1 THE COURT: Exactly.

2 MS. SALTZ: And I found some, as we go  
3 through these suggestions I found something  
4 along those lines as well and a couple of  
5 variants as well.

6 THE COURT: It would be inconsistent with  
7 your defense if we were to keep your undue  
8 hardship instruction in these proposed  
9 instructions, and I wanted to give you the  
10 opportunity to ask for it to be withdrawn or  
11 alternatively tell me that you have in fact  
12 presented it and point to the record where  
13 you've attempted to develop that defense.

14 MS. SALTZ: No, Your Honor, I agree with  
15 you, because in reviewing them last night as  
16 well I realized that in terms as to what the  
17 defense is.

18 THE COURT: All right, very good. We will  
19 make that change.

20 MS. SALTZ: What page is that?

21 MR. RUSSO: 26.

22 MS. SALTZ: 26?

23 (Brief pause.)

24 THE COURT: I believe if we eliminated all  
25 but the first paragraph on page 26 and page 27

1 we will essentially extricate the undue hardship  
2 instruction, but there may be other references  
3 to it, and I'll double check these pages to make  
4 sure that it isn't referenced in more  
5 introductory language elsewhere in the  
6 instructions. All right?

7 MS. SALTZ: Thank you, Your Honor.

8 THE COURT: Now, if I could hear from  
9 counsel -- oh, one other thing I'm going to  
10 incorporate simply because I think it's a good  
11 instruction, and I didn't want to catch you off  
12 guard, I am going to incorporate the defendant's  
13 instruction on the purpose of the Americans with  
14 Disabilities Act, and that is on page 21, it's  
15 instruction, proposed defendant's instruction  
16 15. I am going to incorporate that, it's a  
17 fairly minor point, but I thought it provided a  
18 nice overview of the purpose of the Americans  
19 with Disabilities Act, and that was lacking in  
20 the instructions until I saw that from defense  
21 counsel. Now, let me hear first from  
22 Mr. Crocenzi with respect to any concerns that  
23 the plaintiffs may have with the proposed  
24 instructions.

25 MR. CROCENZI: Just a couple, Your Honor.

1 The first one would be on page 17, last  
2 paragraph.

3 THE COURT: All right.

4 MR. CROCENZI: I suggest that the first  
5 sentence should read, "However, Mr. Shaw cannot  
6 be regarded as disabled if the perceived  
7 impairment is temporary and minor."

8 THE COURT: "If his perceived impairment is  
9 temporary or minor"?

10 MR. CROCENZI: Or "if the perceived,"  
11 because again it's a regarded as standard, so  
12 we're talking about CTE's perception of  
13 Mr. Shaw's condition as of February of 2007. I  
14 don't want the jury to be confused that Mr. Shaw  
15 had to have, this was not a disabled case. It's  
16 a regarded as case, and I think that --

17 THE COURT: Understood. Ms. Saltz?

18 MS. SALTZ: Your Honor, addressing that I  
19 also had an issue with that, too. My position  
20 was that there hasn't been any testimony to that  
21 regard, and I don't think it really applies  
22 based on the evidence that's been produced in  
23 this case because it is a regarded as case, and  
24 I think it's confusing to the jury to even  
25 reference something that's temporary and minor.

1 It just doesn't seem to fit the fact pattern of  
2 what we had come out here on this case.

3 THE COURT: Actually, Mr. Crocenzi, I'm not  
4 sure if you would have a problem if we just  
5 eliminated that paragraph.

6 MR. CROCENZI: We could. I think it's  
7 confusing, too.

8 THE COURT: All right, very good. We will  
9 eliminate the last paragraph on page 17. Next?

10 MR. CROCENZI: Page 22.

11 THE COURT: Yes?

12 MR. CROCENZI: The last sentence regarding  
13 the social security disability issue, my reading  
14 of the Cleveland case is that the analysis of  
15 the statements in application for social  
16 security disability only applies when the  
17 plaintiff has made the application prior to a  
18 lawsuit or I mean contemporaneously at the time  
19 that they go off work, and that's basically what  
20 the facts were in Cleveland, that the plaintiff  
21 made the application and around that same time  
22 was told to, was basically terminated in that  
23 case, and so --

24 THE COURT: And this application was made  
25 in, after the position was eliminated?

1 MR. CROCENZI: That's exactly right. It was  
2 made in November -- well, the representations  
3 that are in evidence were made in January of  
4 2008, eleven months after the incident where CTE  
5 told him to go home. So I object to the last  
6 sentence and I think as we discussed earlier at  
7 side bar conversation that the January '08  
8 representations go to mitigation, and whether  
9 Mr. Shaw at that point gave up looking for work  
10 as the expert testified and was, said to social  
11 security, "I have these problems, I can't work  
12 anymore," and therefore Ms. Saltz can make the  
13 argument to the jury his damages should end at  
14 that point based on that representation.

15 THE COURT: Actually that's an interesting  
16 point. In other words what you're suggesting is  
17 that we extricate that sentence and plug it in  
18 in the mitigation --

19 MR. CROCENZI: Yes.

20 THE COURT: -- section?

21 MR. CROCENZI: Yes, I do, Your Honor,  
22 because I think that's what the cases indicate.  
23 I think that makes more sense to the jury the  
24 way the evidence came out in this case, and  
25 frankly if you look at the first paragraph on

1 that page you're indicating to the jury that  
2 they need to assess whether he was qualified to  
3 perform the essential functions as they existed  
4 in February '07 when CTE placed Mr. Shaw on  
5 leave, which again I think that's a correct  
6 statement of the law in the EEOC regulations.  
7 If you read then the last sentence after going  
8 through the social security disability analysis  
9 I think that will be confusing and it's a better  
10 fit in the mitigation section of the  
11 instructions.

12 THE COURT: All right. Ms. Saltz?

13 MS. SALTZ: I disagree, Your Honor. I think  
14 that first of all one cannot apply for  
15 disability benefits when one is, when they're  
16 working. I mean, you have to be disabled, you  
17 have to be out of work to be able to apply for  
18 disability benefits. So there would never be an  
19 instance that anyone would be able to, you know,  
20 apply for social security prior to. The issues  
21 always come up after the fact. Second of all I  
22 also am concerned that the purpose of it is the  
23 social security --

24 THE COURT: But, but it could occur during  
25 the FMLA leave time frame where the job would

1 then be guaranteed, but in this case it occurred  
2 after Mr. Shaw was literally terminated by  
3 Cumberland Truck Equipment.

4 MS. SALTZ: But the problem with that is  
5 it's the individuals that decide when they want  
6 to apply for the disability benefit, and it's  
7 really not the matter of his applying for the  
8 disability benefit, but rather the  
9 representation to social security, which is  
10 where the judicial estoppel comes in, because  
11 with the conflict between the social security  
12 and the potential conflicts there and the ADA,  
13 the only distinction that was made that someone  
14 would be able to be entitled to ADA protection  
15 if they were able to perform their job with  
16 accommodation.

17 Social security doesn't take that into  
18 account. They don't care whether they can  
19 perform the job with or without accommodations.  
20 They just look at it as far as the individual  
21 being disabled. So the instruction goes to that  
22 effect that if you make representation to the  
23 Social Security Administration that you're  
24 disabled from your job, that you cannot perform  
25 the essential functions of your job, you know,



1 because this case involves whether or not there  
2 could have been accommodation, but if you can,  
3 if you admit that you cannot perform your job,  
4 the essential functions, which he did in this  
5 case, and he only, and he took it a step  
6 further, too.

7 In this case he admitted that he lost his  
8 job because he could not bend per OSHA  
9 requirements and went through all of the  
10 physical requirements that he could not perform,  
11 which were the same requirements of his job. So  
12 I think that my concern was the instruction as  
13 it stands, I only had two additions to it, and  
14 that was in the last sentence that social  
15 security filing concerning his condition, which  
16 limits it to the condition, and you may but are  
17 not required to infer that Mr. Shaw was not a  
18 qualified individual on the basis of the  
19 statements in the filing, and that's under the  
20 model jury instruction, and the purpose of that  
21 is again it goes back to whether or not he's a  
22 qualified individual being able to perform the  
23 essential functions of his job. So I would  
24 certainly say that this, you know, for that  
25 purpose of what this instruction, the purpose of

1 this is, it does apply.

2 MR. CROCENZI: Your Honor, again this is a  
3 judicial estoppel issue which Ms. Saltz just  
4 admitted, and again I think even reading  
5 Cleveland and the rest of the cases on this  
6 issue, that's an issue for the court to decide  
7 rather than the jury, and again that goes to my  
8 argument about it's confusing for the jury to  
9 make a legal decision on estoppel, that it's  
10 better in the mitigation issue, and secondly you  
11 have a case where a guy made the application  
12 several months later.

13 There's been testimony that there was a  
14 change as he indicated in direct and cross  
15 examination, which again affects the whole  
16 estoppel issue. Because of the time gap and  
17 testimony that there was some changes in his  
18 condition I believe it better fits in mitigation  
19 where a jury can make that determination rather  
20 than having them figure out an estoppel issue.

21 MS. SALTZ: Your Honor, if I could just  
22 briefly address that, too, Your Honor. First of  
23 all there would be more weight to the argument  
24 that counsel is giving but for the fact that  
25 Mr. Shaw himself admitted that he lost his job,

1 and the other part of it is that he was deemed  
2 disabled as of February 27th, 2007 because he  
3 could not perform the essential functions of the  
4 job. So the question then goes back to could he  
5 have performed the essential functions with  
6 accommodation. I also disagree with counsel's  
7 reading of the Cleveland opinion.

8 THE COURT: Well, I'm thinking of a  
9 compromise here. I agree with Ms. Saltz that  
10 because in this particular case Mr. Shaw has  
11 made representations that he lost his job  
12 because he could not perform the essential  
13 functions per OSHA. I remember that as being  
14 part of either his application or in some other  
15 manner prior to the receipt of disability  
16 benefits, so I think I'm going to leave this  
17 statement in but maybe we could refer to it in a  
18 more general fashion.

19 Instead of "However, you may consider  
20 Mr. Shaw's statements in the social security  
21 filing, you may consider Mr. Shaw's statements  
22 in support of disability benefits in determining  
23 whether he was a qualified individual."

24 MS. SALTZ: That would be acceptable.

25 MR. CROCENZI: I'm trying to process what

1     you're saying, judge. How would you have that,  
2     you're saying the last sentence would read -- I  
3     don't know if your court reporter got that.

4             THE COURT: Mr. Shaw's statements in support  
5     of disability benefits in determining whether he  
6     was a qualified individual.

7             MR. CROCENZI: I still think it's confusing.  
8     I'm going to stand by my objection, Your Honor,  
9     with all due respect to your means of trying to  
10    reach a compromise in the issue.

11            THE COURT: I understand.

12            MR. CROCENZI: It's an important issue for  
13    my client and one that I think we need to just  
14    continue to object on that issue.

15            THE COURT: All right. That's language that  
16    I'll just need to work on during the course of  
17    closing, but I understand the issue. You both  
18    have objections preserved for purposes of the  
19    record and any appellate action, but I'm going  
20    to try to massage this into a fashion that works  
21    a compromise between your respective positions.  
22    Next, Mr. Crocenzi?

23            MR. CROCENZI: No, that was it.

24            THE COURT: All right. Ms. Saltz, anything  
25    else?

1 MS. SALTZ: I have more than he does. On  
2 page 12, I'm trying to keep consistent in  
3 reading these instructions the terminology that  
4 we're using. This area of the law is so complex  
5 to begin with, especially for a lay jury to  
6 understand, and what I've attempted to do here  
7 is keep within the terms that we've, you know,  
8 the court has used throughout. So at the bottom  
9 of page 12, "to perform the essential functions  
10 of the job," it reads now, "with reasonable  
11 accommodation if necessary," I would just change  
12 that to "with or without reasonable  
13 accommodation."

14 THE COURT: All right. This comes directly  
15 from the model Third Circuit instructions. So  
16 I'm going to stick with that.

17 MS. SALTZ: On page 13.

18 THE COURT: Yes?

19 MS. SALTZ: I guess my concern is that some  
20 of the wording in some of these instructions,  
21 this is a regarded as. Mr. Shaw has to  
22 establish that the company regarded him as  
23 disabled, and if you use the word perceived, it  
24 perceived him, it sounds like an end conclusion  
25 that he's already been perceived as disabled by

1 the company as opposed to being regarded as  
2 disabled. My suggested change would be in the  
3 last paragraph, "Specifically Mr. Shaw alleges  
4 that CTE didn't allow him to work because it  
5 regarded him as disabled, failed to accommodate  
6 him, and retaliated against him for requesting  
7 accommodations."

8 THE COURT: Maybe it would just simply be  
9 easier for me to plug in the word "purportedly"  
10 before "perceived," that it purportedly  
11 perceived him as having. Is that all right?

12 MS. SALTZ: That would work, too, Your  
13 Honor.

14 THE COURT: All right.

15 MS. SALTZ: On the top of page 14 where it  
16 says, "CTE denied Mr. Shaw's claim. Further,  
17 CTE asserts that Mr. Shaw," and it goes on to,  
18 "would have posed a threat to himself," well,  
19 CTE is also asserting that he could not perform  
20 the essential functions of his job and would  
21 have posed a threat to himself and others.

22 THE COURT: All right.

23 MS. SALTZ: In the second paragraph --

24 THE COURT: Hold on one second.

25 MS. SALTZ: I'm sorry.

1 (Brief pause.)

2 THE COURT: All right.

3 MS. SALTZ: Again with the second paragraph  
4 if the word "purported" is to be inserted before  
5 "perceived disability."

6 THE COURT: Certainly.

7 MS. SALTZ: On page 15?

8 THE COURT: Please speak up if you have any  
9 angst or objections.

10 MR. CROCENZI: I will. Thank you.

11 MS. SALTZ: Again just purported, as to the  
12 second paragraph, that Mr. Shaw purported --  
13 wait a second. That doesn't make sense. My  
14 change of the third element was, "and third,  
15 that Mr. Shaw, CTE discriminated against  
16 Mr. Shaw because of disability by engaging," and  
17 the disability being in parentheses as the court  
18 did throughout, "by engaging in an employment  
19 action that was adverse to Mr. Shaw."

20 THE COURT: All right. Again this is a  
21 Third Circuit model instruction. I think this  
22 is clear, so I'm going to reject that  
23 suggestion, with respect.

24 MS. SALTZ: My concern with regard to the  
25 remainder of page 15 into the top of page 16 is

1 I compared it to the model jury instructions and  
2 I just feel that the third element is better  
3 expressed under the, no offense to Your Honor  
4 certainly in the writing of this, but I was  
5 uncomfortable with the way that this was set  
6 forth as opposed to the way it's set forth under  
7 the model instruction. I would just make a  
8 request that Defendant's 31 be substituted for  
9 this instruction.

10 THE COURT: And this is not the instruction  
11 that either party requested with respect to  
12 this element or this claim, and let me just ask  
13 Ms. Manzullo, is this the Third Circuit model  
14 instruction? Page 15?

15 MS. MANZULLO: My pages changed a little  
16 bit, as I have the top of 16 now, I think it's  
17 the same showing his disability was a motivating  
18 factor, if that's the paragraph we're looking  
19 at.

20 MS. SALTZ: It begins with, "Mr. Shaw must  
21 prove that CTE acted with the intent."

22 THE COURT: It's the paragraph just before  
23 that.

24 MS. MANZULLO: Oh, okay. That is from the  
25 Third Circuit model instructions.



1 MR. CROCENZI: Yes, 9.1.1.

2 THE COURT: Yes, that's what I thought. So  
3 we'll stick with this.

4 MS. SALTZ: The only question that I have,  
5 Your Honor, though on page 16, and I haven't  
6 looked at the Third Circuit model on that, but  
7 the very last sentence, "Mr. Shaw is not  
8 entitled to damages if CTE proves by a  
9 preponderance of the evidence that they would  
10 have treated Mr. Shaw the same even if his  
11 disability had played no role in the employment  
12 decision," I'm not sure how that exactly fits  
13 into this case, and it's a little confusing to  
14 me because I think the whole issue is, you know,  
15 whether or not CTE regarded him as disabled and  
16 then took action.

17 THE COURT: All right. I can take that  
18 sentence out. I agree. I don't know that  
19 Mr. Crocenzi has a problem with that. Do you  
20 have any problem with that, Mr. Crocenzi? It  
21 does appear to be inapplicable.

22 MR. CROCENZI: I agree. I don't think it's  
23 going to add or take away anything for the jury.

24 THE COURT: All right. We'll take out that  
25 last sentence.

1 MS. SALTZ: With regard to page 17, I would  
2 ask that at the end of that instruction that  
3 defendant's number 20 be included in that, which  
4 is the one that addresses, "The mere fact that  
5 an employer is aware of an employee's impairment  
6 is insufficient to demonstrate either that the  
7 employer regards the employee as disabled or  
8 that perception caused the adverse employment  
9 action," and I'm relying on Kelly vs. Drexel,  
10 the Third Circuit opinion Kelly vs. Drexel, and  
11 the purpose of --

12 THE COURT: Hold on. Before you go any  
13 further let me make sure I have the right  
14 instruction. I have 20 as based on Toyota  
15 Manufacturing. You're -- I'm looking your  
16 proposed instructions.

17 MS. SALTZ: Yeah, wait a second. I might  
18 have lost my place on that. I was working late  
19 last night, I apologize.

20 THE COURT: Maybe you mean page 20. No,  
21 that's not it.

22 MS. SALTZ: No, this is a new one. This is  
23 from last night looking at the Kelly case in  
24 trying to balance out these instructions, so I  
25 am presenting this as an additional instruction.

1 THE COURT: All right.

2 MS. SALTZ: The reason for that --

3 THE COURT: Before you give me the reason I  
4 need to see the instruction. Do you have a copy  
5 of it?

6 MS. SALTZ: No, I've written it out, so I  
7 can certainly put that in my copy or read it  
8 again slower, much slower.

9 THE COURT: All right.

10 MS. SALTZ: Do you want me to read it again,  
11 Your Honor?

12 THE COURT: Yes, please.

13 MS. SALTZ: "The mere fact that an employer  
14 is aware of an employee's impairment is  
15 insufficient to demonstrate either that the  
16 employer regarded the employee as disabled or  
17 that the perception caused the adverse  
18 employment action."

19 MR. CROCENZI: Your Honor, I don't believe  
20 that is anywhere in the model Third Circuit jury  
21 instructions, and frankly I think that's more of  
22 a standard on a motion for summary judgment  
23 rather than a jury instruction in this case.

24 THE COURT: The first part of that  
25 instruction, "The mere fact that an employer

1 is aware of an employee's impairment," doesn't  
2 speak to a regarded as case.

3 MS. SALTZ: That came out of all of, that  
4 came out of the regarded as section of the Third  
5 Circuit's decision in Kelly vs. Drexel. In all  
6 the cases I reviewed as to the regarded as  
7 there's a fine distinction, and here's where the  
8 balance comes in and certainly I would, you  
9 know, be welcome to any instruction that the  
10 court would come up with. What I'm trying to  
11 accomplish here is that the fact that the  
12 company observed him -- the testimony was that  
13 he was walking, struggling to walk with a limp,  
14 walking slowly.

15 The mere fact that the employer observed  
16 him doing that doesn't mean that they regarded  
17 him as disabled. There has to be more than  
18 that, and that's where that distinction comes in  
19 in terms of regarding him as having a  
20 substantial limitation versus just, you know,  
21 you can observe someone walking with a limp and  
22 you're not going to necessarily regard him as  
23 disabled.

24 THE COURT: I agree, but I thought we  
25 addressed that elsewhere in the instructions

1 when we got to the definition of regarded as  
2 just prior to that.

3 MS. SALTZ: Your Honor may be thinking of  
4 right below number 2, which I have also put a  
5 question mark with because I found that that's,  
6 if that's a part of it --

7 THE COURT: Well, I don't see it in these  
8 draft instructions, so it does seem to be an  
9 appropriate addition to me. Mr. Crocenzi?

10 MR. CROCENZI: I'm sorry, appropriate or  
11 inappropriate?

12 THE COURT: An appropriate. It's simply a  
13 balance of the fact that the employer doesn't  
14 automatically regard somebody as disabled if  
15 they merely perceive them as having an  
16 impairment, whether temporary or permanent.

17 MR. CROCENZI: Well, I think the language is  
18 observed rather than perceived, Your Honor.

19 THE COURT: All right. Observed?

20 MS. SALTZ: Whatever Your Honor would like  
21 to do. I'm just more concerned ensuring that  
22 there's a balance to create the facts, that the  
23 jury doesn't think just because they heard the  
24 testimony that they saw him struggling to walk  
25 across the parking lot, suddenly that falls

1 within the court's definition of his being  
2 regarded as disabled.

3 THE COURT: All right.

4 MR. CROCENZI: Again I think she just, I  
5 think she's making a closing argument statement.  
6 I think when you read the balance of these  
7 instructions in the definitions she can make  
8 that argument to the jury rather than having it  
9 spelled out specifically in the jury  
10 instructions. I agreed with your earlier  
11 statement, Your Honor, that when you look at the  
12 balance of your instructions with definitions,  
13 that point can be made.

14 Ms. Saltz can certainly get up to the jury  
15 and say they didn't regard him as, didn't  
16 perceive him as disabled. They just watched him  
17 and observed him, and that's all they did. So I  
18 think it's covered and I think that's something  
19 she can make in closing arguments based on the  
20 instructions you already have written.

21 MS. SALTZ: And I certainly disagree with  
22 that, Your Honor, because obviously the court  
23 will be giving the instruction, and my making a  
24 statement that's not part of the instructions is  
25 not going to be what they will focus on.

1 THE COURT: Here's what we'll do. We'll  
2 incorporate where you have suggested on the  
3 bottom of page 17, "the mere fact that an  
4 employer observes an employee's, observes or  
5 believes that it observes an employee's  
6 impairment is insufficient to demonstrate that  
7 the employer regarded the employee as disabled  
8 or that the observation caused the adverse  
9 employment action," but then I think there needs  
10 to be a concluding sentence there that says --

11 MR. CROCENZI: If that's the case then we  
12 add another one which I would have to say, "if  
13 the employer takes some action based on an  
14 observation," then that can be, that's the  
15 problem when we start getting into so much  
16 detail in the instructions if you want to try to  
17 balance it. She has that and then I have to say  
18 well, Your Honor, that's not fair, I need to  
19 have an instruction and say well, if they took  
20 some action on the observation then we have to  
21 figure out some wording on that.

22 THE COURT: All right. All right, I agree  
23 with Mr. Crocenzi on this, Ms. Saltz. You may  
24 argue this to the jury. This is the whole  
25 purpose of a charge conference, for us to try to

1 work together to come up with a fair and  
2 balanced charge. You're certainly entitled to  
3 argue that to the jury, but as I have worked  
4 through this and while I'm editing this draft  
5 it's apparent to me that the balance is already  
6 present in the Third Circuit model instructions,  
7 and if I added that suggested language I'm going  
8 to have to conclude with something on the other  
9 side about what it is that Mr. Shaw can do to  
10 meet his burden of proving he was perceived as  
11 regarded as disabled. So for those reasons that  
12 request is denied and your request is preserved  
13 for the record.

14 MS. SALTZ: Thank you, Your Honor.

15 THE COURT: Next?

16 MS. SALTZ: Next is I had a question with  
17 regard to the last paragraph of 18, and again  
18 it's a question of whether or not it applied  
19 under the evidence of this case, and that's the  
20 last paragraph on page 18, in light of the fact  
21 that this is a regarded as case.

22 THE COURT: That may be a good point.

23 Mr. Crocenzi?

24 MR. CROCENZI: I have no objection of that  
25 coming out.



1 THE COURT: All right. The last paragraph  
2 of page 18 is eliminated.

3 MS. SALTZ: On page 19, after the first  
4 sentence, second sentence, "I instruct you that  
5 walking and working are both major life  
6 activities within the meaning of the ADA,"  
7 here's my concern that in order for Mr. Shaw to  
8 be considered subject to the ADA he has to  
9 establish that he was disabled within the  
10 meaning of the ADA by showing that he had been  
11 reported as disabled. That's his burden of  
12 proof.

13 I'm just going to read what I'm suggesting  
14 as an addition to it for the court's  
15 consideration. At the end of that I just wrote  
16 that, "If Mr. Shaw cannot establish that CTE  
17 regarded him as disabled, then Mr. Shaw has not  
18 established that he is disabled within the  
19 meaning of the ADA," and I cite to the  
20 regulation 29 CFR 1630.2-L and also Kelly vs.  
21 Drexel.

22 THE COURT: And that is rejected. It has  
23 been addressed. It's later on on page 19,  
24 middle of the second paragraph, "If Mr. Shaw  
25 cannot establish that he is qualified to perform

1 the essential functions of the warehouse worker  
2 position even with reasonable accommodation,  
3 then Mr. Shaw is not a qualified individual  
4 under the ADA. If that is the case, then you  
5 must return a verdict for the CTE, even if the  
6 reason why Mr. Shaw is not qualified is solely  
7 as a result of his disability." I'm confident  
8 that that's covered, and these are the model  
9 Third Circuit instructions, so that request is  
10 rejected.

11 MS. SALTZ: And I'd just note my objection  
12 for the record. At the bottom of 19, "In this  
13 case Mr. Shaw claims he was able to perform the  
14 essential functions of the warehouse position  
15 if it was modified, and then CTE contends that  
16 Mr. Shaw was unable to occasionally lift and  
17 carry up to 150 pounds," follow to the end of  
18 that sentence.

19 THE COURT: Yes.

20 MS. SALTZ: I believe that this is  
21 inappropriate for an instruction for the reason  
22 being that there is a lot of facts in dispute  
23 with regard to this. I think the jury needs to  
24 decide whether or not he requested an  
25 accommodation and what that accommodation was,

1 and that CTE's position was not that he could  
2 not lift and carry up to 150 pounds and up to  
3 seventy pounds, but rather that he was unable to  
4 walk, stand, squat, bend, which were all of the  
5 essential functions of the job that were  
6 required to be performed frequently. So my  
7 request would be that the last, the beginning of  
8 the two sentences on page 19 to the end where it  
9 says "warehouse position" be removed and let the  
10 jury determine what those facts are.

11 THE COURT: I don't have a problem with  
12 that. I agree with you that that is intended as  
13 a summary, and if you want to argue more detail  
14 to the jury I don't have a problem with that.  
15 I don't see why we need to eliminate the last  
16 sentence at page 19 and just incorporate that as  
17 the first sentence in the paragraph beginning,  
18 "it is Mr. Shaw's burden to prove."

19 MS. SALTZ: "It is Mr. Shaw's burden to  
20 prove that he was able to perform the essential  
21 function"?

22 THE COURT: Yes.

23 MS. SALTZ: And then as far as --

24 THE COURT: In other words we're just  
25 eliminating the first sentence on page 20.

1 MS. SALTZ: That's fine, Your Honor. Thank  
2 you.

3 THE COURT: Not a problem. Anything else?

4 MS. SALTZ: On page 24, the fourth element  
5 that providing the accommodation at issue in  
6 this case, that is modifying Mr. Shaw's job  
7 would have been reasonable, again I think that's  
8 for the jury to decide what his accommodation  
9 was and what he had requested since there were  
10 certain things that had come out on testimony.  
11 I would just have it read that providing the  
12 accommodation would have been reasonable.

13 MR. CROCENZI: I think that's an appropriate  
14 statement and provides some guidance to the  
15 jury, Your Honor, based on what the evidence has  
16 occurred in this case.

17 THE COURT: Yes, I think that's a harmless  
18 innocuous clarification and provides some  
19 direction, so that request is rejected.

20 MS. SALTZ: On page 26, Your Honor, the  
21 first paragraph.

22 THE COURT: Yes?

23 MS. SALTZ: I'm unsure about that. I'm not  
24 sure why I'm unsure about that to be quite  
25 honest with you. It just --

1 THE COURT: You know, it's funny that you  
2 would say that, Ms. Saltz, because when I read  
3 that I had the exact same reaction. I thought  
4 that cooperation in the interactive process was  
5 a requirement, but let me ask Ms. Manzullo, is  
6 that part of the model instructions from the  
7 Third Circuit?

8 MS. MANZULLO: I believe it is although, I  
9 don't remember the exact chapter number, but I'm  
10 sure I can find it in a moment.

11 MS. SALTZ: That's about the only thing.  
12 There's nothing more I can say about that, Your  
13 Honor. Just my initial reaction when I read it  
14 I was just --

15 THE COURT: I had the exact same reaction,  
16 so I understand where you're coming from.

17 MS. SALTZ: I will leave that one to the  
18 wisdom of the court.

19 THE COURT: Let me put it to you this way.  
20 If it's part of the Third Circuit model  
21 instructions we'll keep it in. If it's not,  
22 I'll take it out.

23 MR. CROCENZI: It's in 9.1.3.

24 MS. MANZULLO: I just found it. I think the  
25 reason it's phrased that way is because the

1 other party's failure to participate in the  
2 interactive process wouldn't necessarily entitle  
3 their opponent to a verdict. For instance, you  
4 know, you could say plaintiffs find that the  
5 defendant failed to engage in the interactive  
6 process but still find that the plaintiff  
7 doesn't have a disability or something like  
8 that.

9 THE COURT: I agree. I agree. That is  
10 logical in that context. So we'll keep it in.

11 MS. SALTZ: I believe the only -- oh, I did  
12 have defendant's instruction 41.

13 THE COURT: All right. Does that address  
14 all that you have with respect to the draft?

15 MS. SALTZ: On page 43 I believe it's the  
16 last one, I think we need an instruction on  
17 expert witnesses that I did not find in here.

18 THE COURT: I agree. We'll put the expert,  
19 the model instruction in on expert witnesses.

20 MS. SALTZ: And then on page 43 I would make  
21 a request that defendant's instruction 41 be  
22 included after that first full paragraph which  
23 is a good faith effort of reasonable  
24 accommodation.

25 MR. CROCENZI: You're on 43 of the draft?

1 MS. SALTZ: It's on page 50 of my  
2 instructions.

3 MR. CROCENZI: No, but you want it  
4 incorporated in 43?

5 MS. SALTZ: No, no -- right, on page 43.

6 MR. CROCENZI: Of the draft?

7 MS. SALTZ: Of the draft, of the court's  
8 draft, after the first paragraph where fixing  
9 the amount of such damages, period, and then I  
10 would request that however the court would want  
11 to rephrase it, but something along those lines.  
12 There was testimony there that certain  
13 accommodations were discussed with Mr. Shaw  
14 and that he, you know, that we made attempts and  
15 that he rejected those attempts.

16 THE COURT: I'm not sure I recall that  
17 testimony.

18 MS. SALTZ: It was with Mr. Sheldon when he  
19 had that meeting with Mr. Shaw and they were  
20 discussing possibly a new position for him.

21 THE COURT: These hands.

22 MS. SALTZ: He said --

23 THE COURT: "These hands are not made for a  
24 typewriter."

25 MS. SALTZ: "I just want to work in a

1 warehouse."

2 MR. CROCENZI: You want the whole  
3 instruction 41 to come in, your proposed 41?

4 MS. SALTZ: My proposed 41 or anything the  
5 court would deem falls within, you know, taking  
6 the tenure of what that instruction reads.

7 MR. CROCENZI: Your Honor, I think that's  
8 already been covered in these instructions in  
9 your reasonable accommodation section.

10 MS. SALTZ: This goes to the damages, Your  
11 Honor. That's why I put it on 43.

12 MR. CROCENZI: I'm not sure why it would  
13 apply here.

14 THE COURT: All right. We need to move  
15 along here. I'll take a look at this. I'm not  
16 sure if I'm going to incorporate it or not.  
17 I'll see whether or not I consider it to be  
18 repetitive, but we need to move along. Anything  
19 else, Ms. Saltz?

20 MS. SALTZ: No, other than we need expert  
21 witness instructions, I think that covers  
22 everything on the part of the defense.

23 THE COURT: All right, and the verdict form  
24 is materially different from what either side  
25 provided, but it is something of a hybrid which



1 I find addresses in chronological -- not  
2 chronological, excuse me, in logical fashion the  
3 each of the claims. Question 1 is about  
4 disability. Question 2 is about qualified  
5 individual, and then question 3 and 4 get to the  
6 two, first two claims, discrimination and  
7 failure to accommodate. Question 5 then goes to  
8 the third claim, retaliation. And then you only  
9 get to the instructions on damages, question 6,  
10 7, 8, and 9 if there are appropriate responses  
11 to the first five questions. Any concerns with  
12 respect to those, to the verdict form?

13 MR. CROCENZI: No, Your Honor.

14 MS. SALTZ: No, Your Honor.

15 THE COURT: All right. Very good. Counsel,  
16 let's take a short break. Let's reconvene at  
17 10:55 and we'll have closing arguments. You  
18 have an opportunity for rebuttal, Mr. Russo.  
19 would you like to reserve five minutes for  
20 rebuttal?

21 MR. RUSSO: Yes, Your Honor.

22 THE COURT: All right. Very good. We're in  
23 recess until 10:55.

24 MR. RUSSO: Your Honor, how long -- is there  
25 a limitation on our closings?

1 THE COURT: No, but I'll start to fidget if  
2 you go past forty minutes.

3 MR. RUSSO: Okay.

4 (Recess taken from 10:45 to 11:02 a.m.)

5 THE COURT: Just two quick matters that I  
6 wanted to address before we brought the jury in.  
7 One, Ms. Saltz, I am going to incorporate your  
8 proposed instruction 41. I think it is  
9 pertinent to the facts of the case and I don't  
10 believe that it is covered elsewhere in the  
11 instructions and I think it's a reasonable  
12 request. So I am going to incorporate that.

13 Second, and this, you may have already  
14 anticipated this, but the jury verdict on the  
15 front pay and back pay is advisory only, but I  
16 am asking for the jury to, if they get to that  
17 question, to render a verdict on front pay and  
18 back pay in an advisory fashion. Obviously I'll  
19 take the jury's verdict into consideration if I  
20 need to exercise discretion on those two aspects  
21 of the claim. All right? Any questions about  
22 either of those matters?

23 MR. RUSSO: No, sir.

24 THE COURT: All right. Ms. McKinney, you  
25 may escort the jury.

1 MR. CROCENZI: Your Honor, is it okay if we  
2 have those exhibits facing this way or do you  
3 want them --

4 THE COURT: No, that's fine. Don't worry.

5 MR. RUSSO: Your Honor, a preference on how  
6 they're put up, just once we start just go  
7 ahead?

8 THE COURT: Not a problem. Ms. Saltz, if  
9 you would like to move you certainly can. I  
10 don't think, I think it's a little more  
11 distracting in closing arguments for the court  
12 to move so I'll remain seated, but don't feel  
13 like you need --

14 MR. RUSSO: Okay.

15 THE COURT: -- to present that so that I can  
16 see it. I'll stay seated.

17 MR. RUSSO: Okay.

18 THE COURT: And we have a sign up indicating  
19 that there's no entrance during closing  
20 arguments and the charge, so hopefully there  
21 will be no interruption. Just check your cell  
22 phones.

23 (Jury seated at 11:05 a.m.)

24 THE COURT: Ladies and gentlemen, please be  
25 seated. This is the time for the closing

1 arguments of counsel. The party with the burden  
2 of proof in this case, the plaintiff, will  
3 present first. Then the defendant's counsel  
4 will present her closing argument, and then  
5 finally Mr. Russo will have an opportunity for  
6 brief rebuttal, and at this time the court  
7 recognizes attorney Peter Russo for purposes of  
8 closing argument, and, Mr. Russo, you may  
9 address the jury.

10 MR. RUSSO: Thank you, Your Honor. May it  
11 please the court, counsel, ladies and gentlemen  
12 of the jury. Good morning. On behalf of Ricky  
13 Shaw and Michael Crocenzi I want to thank you  
14 for your time and attention to this matter.  
15 Mr. Crocenzi told you on Monday that this case  
16 was about a man who is a hard working employee,  
17 who one day CTE said go home. Ms. Saltz told  
18 you that Cumberland did that because they were  
19 concerned about Ricky. We think by now we have  
20 shown to you that nothing could have been  
21 further from the truth.

22 I'm going to try and paint for you a  
23 picture rather than go through testimony detail  
24 by detail, a picture of what was going on. What  
25 we'll kind of see in a Norman Rockwell that

1 later gets disturbed. Here's Ricky, a 21-year  
2 veteran of the Army, who when he was retired  
3 jumped from job to job to job. He doesn't find  
4 anything that quite fits, and then he finds  
5 Cumberland Truck. In an otherwise average world  
6 Ricky finds a job as big as him. Standing 6'  
7 9", we'll call him 400 pounds, he gets a job in  
8 a warehouse that's gigantic. Big trucks, big  
9 parts, big guy.

10 In fact, you heard him talk about when he  
11 got to the smaller parts warehouse, bull in a  
12 china shop, couldn't do it. Get him into the  
13 big shop. He takes that job and he starts to  
14 shine. He's there for about two years, and then  
15 he tells you, "My duties start to evolve. I'm  
16 doing well. I start taking on new duties." In  
17 fact, he starts to take on some of those duties,  
18 and as you saw in his evaluation they're good.  
19 They're very good. Here is his evaluation the  
20 year before he was separated from his  
21 employment, and again a good evaluation.

22 He is focused on the fact that he's doing  
23 good things. He's telling you at this point  
24 he's working that forklift, he's doing all the  
25 things he needs to do. All is going great until

1 Chuck Hoffman sees him laboring across the  
2 parking lot. Chuck Hoffman at that point sees  
3 him do something that raises concerns for Chuck.  
4 So what does Chuck do? He takes action. Not  
5 just the perception that he sees this, but he  
6 does something else. They do a lot of things  
7 else. They start meetings. They bring in the  
8 management team. You heard that Brenda Hoffman  
9 says that she saw this struggle going on for  
10 weeks, whether it was a couple of weeks or  
11 several weeks. Pat Whitmire says, "I knew about  
12 his needs." Tim Kline says, "I knew about it  
13 for six months."

14 So they get together not once, but at least  
15 twice, to talk about Ricky, to talk about what  
16 to do with Ricky. Interestingly if you remember  
17 the opening arguments, or the opening statement,  
18 I'm sorry, here's where I need Ricky. I'll take  
19 it off that way. Ms. Saltz posed this question  
20 to you. In essence what do we, CTE, do with an  
21 employee that we like when we see them struggle?  
22 well, let's talk about things that we talked  
23 about. We like Ricky, so we're worried about  
24 him struggling, worry about him being a danger  
25 to himself or others. Surely they can point to

1 examples of how Ricky was a danger to himself or  
2 someone else.

3 I don't remember that, and you shouldn't  
4 either because they really couldn't point to  
5 anything. You'd think at least this valued  
6 employee, the one that they called honest and  
7 hardworking, they'd sit down with him and say  
8 hey, Ricky, what's going on. They didn't do  
9 that either. Well, if they're not going to do  
10 that, they tell you that they have a safety  
11 committee. Let's refer him to the safety  
12 committee. It wasn't really time for that.

13 Now we're seeing that Tim Kline has seen  
14 him struggling for six months, Brenda has seen  
15 him for two or three, several weeks, whichever  
16 it was, but we don't do that. We don't even  
17 offer him FMLA because we're concerned, even  
18 though they offered Ricky FMLA when his wife  
19 passed away. So what do we do? We send him to  
20 Concentra. That Norman Rockwell, the job that  
21 Ricky had that he loved, the job that fit him,  
22 the job that he needed and the job that he  
23 thought needed him, was now in question.

24 That Norman Rockwell is knocked off the  
25 wall by Chuck Hoffman and the management team's

1 actions to get together, discuss Ricky, and now  
2 sen him to Concentra. To Concentra they send  
3 him with that job analysis. Do you remember  
4 that thing? Let's put that back up for you  
5 guys. And remember that job analysis is  
6 something that nobody really took credit for  
7 creating. Tim Kline says, "I didn't do it."  
8 Pat Whitmire says no involvement. Brenda  
9 Hoffman says no real involvement. Chuck says no  
10 real involvement. This is created for a  
11 worker's comp type case, a fitness for duty  
12 worker's type comp test that you're sending  
13 Ricky out because somebody sees him struggling  
14 through a parking lot.

15 Let's look at this. Guys, I went to law  
16 school because I was bad at math. Could have  
17 been a doctor but couldn't add too well. But I  
18 want you when you get back to the jury room to  
19 look at this thing, carefully. Ms. Saltz is  
20 going to tell you that this document showed that  
21 Ricky can't do the essential job functions of  
22 this worker position. The judge is going to  
23 instruct you later on what that means, and  
24 listen to the instructions because there are  
25 several about what constitutes an essential job



1 function, but I want you to count them.

2 There are sixteen categories on that list,  
3 and look at them. Think about them. There's  
4 three things that are missing from that  
5 category: breathing, blood pumping, and thinking  
6 maybe. Other than that it's everything the  
7 world, the human being can do. Are those really  
8 the essential job functions of a warehouse  
9 worker? On top of it look at the last page. On  
10 the last page at the bottom, if you can see it,  
11 they have percentages of time that are supposed  
12 to be spent on these things, on these individual  
13 duties.

14 First we have the occasional says 1 to 33  
15 percent of the time. Okay? Double check my  
16 math again. I gave him the benefit of the  
17 doubt. For every job duty that they list I used  
18 a lower scale. So for something that was said  
19 to be done frequently, it says it's the range is  
20 34 to 65 percent. He's at 34 percent. Added  
21 them up. 381 percent of the time Ricky is  
22 supposed to be doing those job duties. I know  
23 we're all trying to cram a lot of hours into a  
24 day, folks, but they've got 381 percent of the  
25 time Ricky is doing these different job duties.

1       which ones are essential?   which ones aren't?

2               This evaluation you heard testimony about.  
3       Dr. Walker, who Brenda Hoffman says she talked  
4       to, and based on her conversation with Dr.  
5       Walker she had a follow-up conversation with the  
6       management team, and then the management team  
7       decided to tell Ricky time to go home, but  
8       Dr. Walker said, "I didn't talk to her. It  
9       wasn't me." Dr. Walker didn't even do this  
10      exam.

11             Dr. Walker couldn't even explain to you why  
12      these things are on this form, and this is what  
13      they relied on to tell Ricky to go home. After  
14      six and a half years of doing the job that he  
15      had been doing as well as he had been doing,  
16      they tell him to go home because Chuck Hoffman  
17      saw him struggle, had meetings, sent him to a  
18      physical which is a return to work worker's comp  
19      physical, had a physician's assistant do an  
20      evaluation, and then the doctor signs off on it,  
21      and by the way, did you ever see Dr. Walker or  
22      the PA say here are the accommodations that  
23      Ricky could do this job with? No.

24             What was the physical? Ricky told you  
25      about it. "I walked in, touched the ground."

1 Ricky told you he hasn't touched the ground  
2 in a couple of decades. Squats. He squatted  
3 two to four inches. Apparently not enough.  
4 Mr. Crocenzi questioned him and says where does  
5 it say how far you got to squat? Where does it  
6 say how far you got to walk, or climb, or stand,  
7 or any of these things? It doesn't. You're  
8 going to hear some testimony that Ricky Shaw  
9 himself said, "I can't bend per OSHA standards,"  
10 and Ms. Saltz is going to tell you that. I want  
11 you to challenge her, challenge her to show you  
12 one single solitary piece of evidence that says  
13 Ricky Shaw had to bend per OSHA standards.

14 They haven't showed you a manual.  
15 Dr. Walker didn't know it because it doesn't  
16 say it here. There's no requirement that you  
17 have to bend per OSHA standards. What Ricky  
18 tried to explain to everybody, including us, to  
19 the doctors, to his employer, "The reason why  
20 Dr. Walker and the PA said I couldn't lift or  
21 perform 150 pounds wasn't because I couldn't  
22 pick it up and move it," because Ricky told you,  
23 "I can do anything I want to do."

24 What Ricky couldn't do was, "I can't do it,  
25 bend down in a squat, catcher's squat stance,

1 and pick up 150 pounds." He wasn't even given  
2 the opportunity to do that. So Ricky goes back  
3 to CTE with this analysis in hand, hands it to  
4 Brenda. Brenda had already completed the FMLA  
5 form. Time to go. Go take short-term  
6 disability. Get out. Now, again I'm going to  
7 point to you and show you that Ricky at that  
8 point was doing his job, so much so that his  
9 evaluation just prior, and remember, January  
10 10th, 2007, thirty something days earlier,  
11 thumbs up. You're the man, Ricky. You're doing  
12 what you got to do.

13 Now, Ricky is being told that somehow he  
14 can't do the job he's been doing for six and a  
15 half years. He can't do this job, these evolved  
16 duties that have been going on for four years.  
17 Brenda tells you those weren't job duties, they  
18 weren't evolving, those weren't it. Wait a  
19 minute. The two men that rely on Ricky day in  
20 and day out to get his job done, Tim Kline and  
21 Pat Whitmire, never have a problem with his  
22 change of duties. Chuck Hoffman says he spent a  
23 lot of time on the forklift, but doesn't do  
24 anything about it.

25 There's never a discipline, there's never

1 an instruction to stop, there's nothing. They  
2 let him do his job. They made and accommodated  
3 him at that point. They let him just do what it  
4 was that he was doing. Without issue. Without  
5 discipline. And now because they send him to  
6 Concentra for this exam, and remember, an exam  
7 that he didn't have to take to get the job, it  
8 didn't exist, didn't have to take when he had  
9 his leg turned to hamburger in a comp injury,  
10 didn't have to even take it when they created  
11 it, and Ricky told you again, "If you had given  
12 it to me when I first started I couldn't even do  
13 the job and I expect couldn't do that squat  
14 down. Nonetheless I got my job done every  
15 single day. You gave me raises every single  
16 year. You never did anything to tell me I'm not  
17 doing a good job."

18 So now Ricky goes home after being sent and  
19 told take short-term disability. Befuddled and  
20 shocked, this is my home, what am I going to do?  
21 He sits there and he's frustrated. So what does  
22 he do? He goes home and he writes a letter. He  
23 writes a letter to Brenda Hoffman and passes it  
24 out to the entire staff and says, "I disagree.  
25 I completely disagree." He tells you again,

1 explains in this letter, "It's not that I can't  
2 do my job. I just can't do it the way  
3 Dr. walker thinks I have to do it." Dr. walker,  
4 you have an entire management team that sees him  
5 every day and nobody questioned it, but  
6 Dr. walker, who has never been -- again let's  
7 remember this, it isn't even Dr. walker. It's  
8 the PA. Never been to the place, doesn't really  
9 know what's going on there, but somehow he says  
10 he can't do it. Ricky says it best again, "You  
11 can modify my job description as warehouse  
12 receiver to fit what I really do. You can leave  
13 the situation as it is and has been for a very  
14 long time."

15 Ms. saltz is going to come up here and tell  
16 you that Ricky never asked for any  
17 accommodations. There it is, folks. He asked.  
18 He talks to them about it, because after he  
19 hands this letter and he goes in and he clocks  
20 in and starts to work, they have to call him  
21 back in and say come on, you can't work, you're  
22 supposed to be on disability. Ricky explains to  
23 them, "I'm doing it. where and why do I need to  
24 go somewhere?" And they say, "Pass this test  
25 and you can come back to work." How about the

1 epitome of a no win situation? He knows this  
2 isn't a reasonable test. He knows this is  
3 inaccurate. While he says from the stand, "I  
4 can lift 150 pounds because I can do it. I can  
5 literally pick it up and move it. I can do  
6 everything on that list. It's not necessarily  
7 in my job duties, but I'm not going to be able  
8 to lift the way Dr. Walker wants me to." So  
9 Ricky sits and he starts thinking, "What am I  
10 going to do? What am I going to do? What am I  
11 going to do?" He doesn't want to, he fights, he  
12 struggles with the idea of short-term  
13 disability, but eventually he succumbs because  
14 "I don't have any more money, I'm running out."

15 He goes to Dr. Walker, hey, you filled this  
16 stuff out, disable me. Dr. Walker won't do it.  
17 He goes to Dr. Oplinger, and here's an important  
18 point for you guys to think about. He goes and  
19 sees Dr. Oplinger on the 4th of March 2007.  
20 Dr. Oplinger at that point doesn't say, "Ricky,  
21 you're disabled. Ricky, there's a problem.  
22 Ricky," anything. He says, "Ricky, your knees  
23 are bad," something Ricky says has been the case  
24 for a really, really, really long time.  
25 Dr. Oplinger doesn't say, "Ricky, don't go back

1 to work. Just know that at some point in the  
2 future you're probably going to need a knee  
3 replacement because we're eventually getting  
4 down to the point where it's slowing up, it's  
5 not going to go any further." Okay. Days later,  
6 days later Ricky writes a letter to Dr. Walker  
7 and says, "I can't get anyone to do my  
8 disability for me, would you do it?" Dr. Walker  
9 fills this paperwork out.

10 THE PLAINTIFF: Oplinger.

11 MR. RUSSO: Oplinger. I'm sorry,  
12 Dr. Oplinger fills out the paperwork. Hmm, a  
13 couple of days later, no problems, no issues. A  
14 couple of days later he fills it. Now, again  
15 you guys can infer what you want from that, but  
16 it seems odd. Ricky nonetheless is still trying  
17 to figure out how he can get back to Cumberland  
18 and he goes back for a second evaluation with  
19 Dr. Walker, and during that second evaluation he  
20 actually does meet with Dr. Walker, and if you  
21 remember Dr. Walker, Dr. Walker even notes in  
22 this that the patient Ricky says that it really  
23 doesn't correspond with his true job  
24 description, and Dr. Walker says that his  
25 evaluation and final determination is made



1 solely on the job description, but then remember  
2 Dr. Walker couldn't remember what else played a  
3 role. That's why you write things down, Doc.  
4 That's why we have notes, his notes said solely  
5 on the job description. Interestingly the last  
6 page of that, which is really important to us,  
7 this time he actually said the word  
8 accommodation, and he wants you to look at those  
9 things. Unable to carry up to 150 pounds  
10 occasionally. Number one, you heard testimony  
11 from Ricky's direct supervisor, Tim Kline, that  
12 said that isn't even required. 75 to 100  
13 pounds. Maybe.

14 Then you heard it from Tim Kline's  
15 supervisor that 65 pounds unassisted was all he  
16 needed to do, but somehow Ricky has to do 150,  
17 and Dr. Walker says if you can accommodate that  
18 he can go back to work. The accommodation was  
19 already in place, folks. It was already there.  
20 Same thing with the carrying requirement. It's  
21 already there. Tim Kline testified nobody  
22 should carry anything. That's why we have the  
23 cart. Pat Whitmire said assisted. Squatting at  
24 all, Tim Kline his supervisor testified that you  
25 could do the job without squatting at all. His

1 deposition testimony said you can do the job  
2 without squatting at all. He doesn't need to  
3 bend frequently, stand or -- stand or bend.  
4 Ricky told you already he wasn't doing a whole  
5 lot of that anyway in his evolved position.

6 What's interesting is Tim Kline, who isn't  
7 here to defend himself, is the person that  
8 everybody was saying was an ineffective  
9 supervisor. He let these things go, but  
10 remember Pat Whitmire, the superstar, approved  
11 all these things, let these things happen. Tim  
12 Kline, the ineffective manager, was a manager  
13 for nine and a half years. For somebody that's  
14 ineffective I would think they would have gotten  
15 rid of him a lot sooner, which also goes back to  
16 something that Brenda said. Ricky couldn't do  
17 the job. He wasn't doing the job requirements.  
18 These weren't his duties. Why did you give him  
19 good evaluations all the way through? Why did  
20 you give him good evaluations 35, 37 days before  
21 you told him to go home? Why?

22 They talked about this condition, we're  
23 worried about this condition. What is his  
24 condition? His condition seems to be fear.  
25 Fear that Ricky, you know, might create some

1 liability to the company. Not necessarily for  
2 him, for the company. We, Ricky again, you  
3 know, Ricky filed for social security  
4 disability. At some point later on after  
5 everything happened Ricky got down to the point  
6 where he was truly, truly struggling, and again  
7 this morning you heard Dr. Oplinger's testimony.  
8 In October of 2008 Ricky went to go see  
9 Dr. Oplinger, and at that point Dr. Oplinger  
10 said, "You might need a knee replacement."

11 Things are painful. Dr. Oplinger agrees  
12 pain is a variable. If you can deal with it you  
13 deal with it. He didn't even know how long  
14 Ricky had end stage bone on bone issues. He  
15 just knew that at some point Ricky is going to  
16 need a knee replacement. Ricky waits until June  
17 of 2008. Now, what's interesting again, social  
18 security disability is in the middle of that.  
19 In January of 2008 Ricky fills out his  
20 functional form, and at that point he told you  
21 he had gained sixty plus pounds.

22 At that point life was dramatically  
23 different. Life was dramatically different, and  
24 now he couldn't do a lot of the things he could  
25 do before, and in fact even at this point he

1 didn't necessarily need the knee replacement.  
2 He waited. He was still able to get around, not  
3 as well, and he even explained in that document  
4 that, "I can't do the lifting the way somebody  
5 else tells me to lift." Ricky goes and  
6 basically tries to find other employment and he  
7 learns that it's just not there for him. CTE  
8 would have you believe that Ricky had an  
9 opportunity for a job opened for him, that here  
10 was this job that was going to be open for him  
11 if he could just get back.

12 You heard Mr. Sheldon testify from the  
13 stand that while he's going to blame his  
14 lawyers, but there were no jobs available for  
15 Ricky. There was nothing available in that time  
16 period even though they wanted to say there was.  
17 Ladies and gentlemen, Ricky was viewed as  
18 disabled by his employer. They perceived him as  
19 being disabled when Chuck Hoffman saw him walk  
20 across that parking lot and then engage in a  
21 course of action to start to put Ricky out the  
22 door. He met with management, they sent him to  
23 a doctor for an exam that made no sense, which  
24 was inaccurate and inapplicable, and then  
25 basically said when you can pass this exam we'll

1 let you come in. we'll let you come back.

2 Interestingly, ladies and gentlemen, Brenda  
3 talked or everyone talked about how there was  
4 opportunities for Ricky. More letters, come on  
5 back. There's something there maybe. But I  
6 want to show you Ricky's wage statement that  
7 Brenda Hoffman testified to us was accurate.  
8 we'll see only page 1. This is the wage  
9 statement. I want you to take a look at the run  
10 date and time. September 19th, 2007. This is  
11 the day that they say was Ricky's last day.  
12 This statement was a statement that Brenda told  
13 us from that very chair was accurate and  
14 correct.

15 How about this, folks? Ricky's termination  
16 date on their own internal document it said  
17 2-28-07. Tell me this. If they didn't plan to  
18 get rid of him, why is that date on this sheet?  
19 On 2-28-07 they knew Ricky was no longer going  
20 to be an employee at Cumberland Truck. They put  
21 it on their own internal document, a document  
22 that was created months later but still  
23 maintained the date that they got rid of him and  
24 knew they were getting rid of him. We all do  
25 things with self preservation on our minds, and

1 an employer is free to make some self  
2 preservation arguments and have some thoughts,  
3 but when self preservation violates the law,  
4 fairness and justice needs to prevail. Ricky  
5 Shaw was put out of work. Ricky Shaw lost  
6 money. Ricky Shaw's expert showed to you in  
7 essence this summary exhibit, showed you the  
8 dollars that Ricky would have lost. Now, again  
9 Ms. Saltz is going to come up and tell you that  
10 number is dramatically wrong, that number needs  
11 to be limited, that number has to be reduced, it  
12 has to be reduced by the social security  
13 disability money that Ricky has gotten. The  
14 judge is going to give you some instructions on  
15 how that applies in this case.

16 what I want you to remember is that the  
17 only reason why we're talking about social  
18 security disability benefits and the short-term  
19 disability benefits is because of the actions of  
20 Cumberland Truck. But for them telling Ricky he  
21 couldn't do this it wouldn't be there. Again  
22 challenging to show me an OSHA anywhere  
23 reference. It doesn't exist. It doesn't exist.  
24 The only personal that had OSHA in their mind  
25 was Dr. Walker for some unknown reason, because

1 it's not a part of the description, and Ricky,  
2 who understood why Dr. Walker was doing this.  
3 All Ricky wanted to do was, "Let me do what I'm  
4 doing. Let me do what I've done. why would you  
5 stop me? Again, I'm a good employee. You admit  
6 that." Because they're concerned, because  
7 they're afraid, and again self preservation.  
8 When self preservation violates the law, justice  
9 and fairness needs to prevail. In order for  
10 justice and fairness to prevail, ladies and  
11 gentlemen, you need to bring a verdict back for  
12 Ricky. I thank you for your time and your  
13 attention again on behalf of Michael and Ricky.  
14 Thank you.

15 THE COURT: Thank you, Mr. Russo. If you  
16 would just move those to the side? Thank you,  
17 Mr. Crocenzi. Ladies and gentlemen, it's now  
18 time for the closing arguments from defense  
19 counsel, and at this time the court recognizes  
20 Ms. Saltz. Ms. Saltz, you my address the jury.

21 MS. SALTZ: Thank you, Your Honor. Good  
22 morning. Mr. Shaw, you heard him testify for a  
23 very long time here in court. He's a very proud  
24 man. He's a good man. He is a hard working  
25 man. He's a man who lived his job at Cumberland

1 Truck and did his job well. Took on  
2 assignments, organized it, color coding appeals  
3 to me because I'm a color coder, you know. I  
4 like sharing that that he was able to color code  
5 the shelves. Ricky Shaw was the only one that  
6 really knew what was going on. His heart was  
7 there. His spirit was there. His soul was  
8 there. Physical, part not so much. As human  
9 beings we have to feel for that, we have to feel  
10 for this man who loved his job, and then one day  
11 was told after an exam that he couldn't meet  
12 those physical requirements, and that's okay,  
13 because as human beings we should feel, but  
14 having said that because I do feel, Cumberland  
15 feels, I'm sure all you do, but when you came  
16 into this courtroom and you took your oath as  
17 jurors, you took the oath to decide this case on  
18 the evidence, on the facts as you decide them,  
19 on the law as Judge Conner will give it to you,  
20 putting sympathy and bias aside.

21 So I'm going to ask you all to do something  
22 very, very hard right now. I'm going to ask  
23 that you take whatever sympathy that you feel  
24 and put it over here and then shut the door to  
25 it, because only then can you truly give a fair



1 impartial verdict based on the evidence, based  
2 on the facts as you find them, based on the law  
3 as the judge gives it to you. Now it's time for  
4 me to finish working so that I can let all of  
5 you begin your job. Going back in time to  
6 February of '07, one of the things that Mr. Shaw  
7 has to prove in this case is that Cumberland  
8 regarded him as disabled, and the judge will  
9 give you, there's lots of definition, the law is  
10 very complex in this area, and I'm not going to  
11 go through that law since the judge will be  
12 going through that law with you, but I'm going  
13 to give you some terms that you will hear in  
14 those instructions.

15 Regarded as disabled. That's what he has  
16 to prove that Cumberland did. Now, the fact  
17 that several managers observed him struggling to  
18 walk, observed the limp, that doesn't mean they  
19 regarded him as disabled. They had an  
20 observation. So what did they know at that  
21 time? You heard Mr. Shaw. He never told anyone  
22 at Cumberland that he had a back problem. Never  
23 told them that he had knee problems. Didn't  
24 tell them that he was taking pain medication,  
25 antiinflammatory medication. That at the end of

1 the day he needed his walking stick or cane,  
2 sometimes in the mornings he needed his walking  
3 cane. Sometimes throughout the day he needed  
4 his walking cane. He never told anyone  
5 anything. He never told them or asked for any  
6 kind of accommodation. He kept that all to  
7 himself, and because of his will power and  
8 because he cared for a job, he kept on pushing  
9 himself physically to do that job.

10 well, you heard in October is when his knee  
11 really started getting worse, and that's when he  
12 went to see Dr. Oplinger, and that progressed.  
13 Yes, that last performance evaluation, perhaps  
14 all his performance evaluations were great, but  
15 in that last one when you look at it, he was  
16 doing the physical job as best as he could. That  
17 was in December of '06. Come into January he's  
18 still doing his job. Chuck Hoffman sees him  
19 half a dozen times now walking a span of about  
20 eighty feet from the warehouse to the main  
21 office.

22 Even seeing him walking slower, struggling  
23 a little bit with walking. Ms. Hoffman saw him  
24 come in, he would sit down as he first came in,  
25 rested, and then continued on his way. This is

1 a company that cares about their employees.  
2 They didn't know what was going on with  
3 Mr. Shaw. He never told them what was going on,  
4 and there are laws that prevent them from asking  
5 employees, but they knew that something wasn't  
6 right. They've known Mr. Shaw since 2000.  
7 Something wasn't right. What was happening  
8 here, Ricky wasn't coming to them. So what did  
9 they do? They did a reasonable thing to me and  
10 say hey, you know what, we're concerned. What's  
11 happening to Mr. Shaw, what's happening to  
12 Ricky. They are not doctors. You've heard  
13 them, you heard Ms. Hoffman, they're not medical  
14 doctors. They didn't know whether he had a  
15 condition or not. They didn't know whether it  
16 was temporary or not. They didn't know what was  
17 causing him to slow down, to struggle walking  
18 now at this point.

19 So what they did was a very reasonable  
20 thing, and that reasonable thing was say send  
21 him to an independent medical facility for an  
22 examination based on his physical requirements  
23 of his job. Now, there has been a lot back and  
24 forth about, you know, was this the physical  
25 requirements, weren't they the physical

1 requirements, 65 pounds, 70 pounds. You know  
2 what? It doesn't matter, because the one thing  
3 that you're not asked when you do sit in this  
4 box and serve as jurors is to leave your common  
5 sense at the door. You're not asked to forget  
6 about your life experiences. So let's take a  
7 step back for a moment and take a look at what  
8 was that warehouse job. That warehouse job was  
9 a Chevy truck parts warehouse. Mr. Shaw gave a  
10 wonderful description of the day-to-day  
11 activities. Mr. Shaw sat up there and to my  
12 question admitted that those assigned duties  
13 were his duties, that those physical  
14 requirements were the job were the physical  
15 requirements for the job.

16 Even in his statement to social security he  
17 said, "Hey, one time I was able to pick up 140  
18 plus pound brake drum from one pallet and toss  
19 it onto another pallet," but think about what  
20 the job entailed. This is not a sedentary job.  
21 A sedentary job is what I do. I sit behind a  
22 desk. Do I sit behind a desk for eight, ten  
23 hours a day? No, of course not. I get up, I  
24 move around. Here this is a warehouse job.  
25 You're on your feet all day long, eight hours a

1 day. Sure, do you sit down occasionally? of  
2 course you do. You sit down to eat lunch, you  
3 sit down to maybe count something, but you're on  
4 your feet eight hours a day. You're standing,  
5 you're walking, you're unloading trucks, you're  
6 putting product on shelves, you're claiming  
7 stairs. What's involved with lifting products?  
8 I don't care if it's you heard about the coffin  
9 box that was filled with miscellaneous types of  
10 parts. Do they fly up to you into your hands?  
11 No. Of course not. The common sense, the  
12 reality is that you need to bend to pick up the  
13 parts. You need to squat. You need to bend.  
14 You need to walk over to a shelf. You need to  
15 put it up on a shelf. You need to reach to take  
16 it down off of a shelf.

17 The essential functions of Mr. Shaw's job  
18 were walking, standing, bending, squatting, and  
19 with that comes carrying and lifting. I don't  
20 care if we're talking 25 pounds of lifting. You  
21 still have to lift, you still have to bend,  
22 squat, pick it up, lift, carry it, walk over and  
23 put it on a shelf. Those are the essential  
24 functions of the job. It's not a sit down job.  
25 It is a moving on your feet all day long job

1 with a lot of heavy stuff coming in. You heard  
2 Mr. Shaw. Look, forty trucks sometimes a day  
3 would come into that facility. Sometimes three  
4 or four, sometimes twenty. He was unloading  
5 those trucks. You heard him testify, he didn't  
6 just sit on a forklift. He took that forklift,  
7 he had to go, take it off a pallet, put it on  
8 another pallet. That's strenuous hard work.  
9 That's what was being on that job, those are the  
10 physical requirements, those are the essential  
11 duties, and that's what you're going to have to  
12 decide. Could he have done those essential  
13 duties.

14 well, by the time he went to Concentra, he  
15 walked in there, he was examined. It wasn't  
16 just fill out a form. He underwent a medical  
17 examination that Dr. Walker discussed and  
18 concurred with. He walked in there with knee  
19 pain and swollen legs. He couldn't squat. He  
20 couldn't bend. Bending wasn't easy for him. So  
21 carrying and lifting is not the upper body.  
22 It's the effect that it has on the body to  
23 carry. Whenever you carried anything that's  
24 heavy, whatever you carried that or lifted,  
25 that's the effect. Now, again Cumberland had no

1 idea what was going on with Mr. Shaw at that  
2 time, but what they did was they relied on a  
3 medical facility to tell them can he do his job,  
4 can he do these physical requirements. why?  
5 Because they were concerned for Mr. Shaw. They  
6 were concerned that they needed to know what was  
7 going on here. Could he do that job so that he  
8 wouldn't hurt himself or hurt someone else. And  
9 you push, you push, your push yourself  
10 physically, physically, physically, what if it  
11 was the day that we had to wait for, the day  
12 that he dropped something heavy on himself, the  
13 day that he's lifting with someone else and  
14 can't handle it, unbalanced, or his knee gives  
15 out and drops that pallet and hurts the person  
16 that he's lifting with? Is that what we wait  
17 for? An incident?

18 So he came, the report came back. He can't  
19 do the physical, the essential functions of that  
20 job. Cumberland didn't want Ricky Shaw to leave  
21 his job. They didn't want to lose him. They  
22 wanted him. If Cumberland Truck wanted to  
23 discriminate against Ricky Shaw they had two  
24 other opportunities to do it. When he came in  
25 for employment and it was found that he had

1 little vision in the left eye and no depth  
2 perception. Hey, that's a disability, or it  
3 could be perceived as a disability. They didn't  
4 say no, we don't want you. They hired him.  
5 When he went out on worker's comp medical leave,  
6 not much different than what happened in this  
7 instance when they said that he couldn't perform  
8 those functions. They didn't know what his  
9 condition was. They could have done it then.  
10 But instead Ricky knew what it took, he went out  
11 on medical leave, he got a doctor's release, he  
12 came back to work, they got him back up to full  
13 duty, he was working, working, working again.

14 what was different this time? They relied  
15 on a medical judgment that he could not perform  
16 those essential elements of his job. Now, if  
17 they wanted to discriminate against him, and  
18 this is where I would like you to ask yourself  
19 the questions when you do go back into  
20 deliberation, Chuck Hoffman saw him struggling  
21 to walk across the parking. If they wanted to  
22 get rid of Mr. Shaw why not just say hey, looks  
23 like you obviously have a problem, you're on  
24 medical leave, here's some forms.

25 They didn't do that. Ask yourself another



1 question. If they thought that he, if they  
2 regarded him as disabled, why did they send him  
3 to another evaluation at their cost? why did  
4 they send him for a third evaluation? Because  
5 they wanted Mr. Shaw to come back to work. They  
6 wanted him to come back to work. They did not  
7 know what was going on. They did not know what  
8 Dr. Oplinger wrote in April of '07, that he  
9 couldn't carry or lift or stand or walk for  
10 prolonged periods. You heard Dr. Oplinger this  
11 morning, repetitive function with someone that  
12 had the condition that Mr. Shaw had, which only  
13 Mr. Shaw knew, would make it worse. But  
14 Cumberland didn't know that. All they knew is  
15 they had a valued, liked, respected employee  
16 that a medical facility found could not meet  
17 those functions, and then gave him the benefits  
18 that he could have should he choose to have or  
19 need to have them.

20 where is Mr. Shaw's responsibility in all  
21 of this? You know, I listened to Mr. Russo talk  
22 to you and I'm thinking to myself wait a minute,  
23 okay, if you disagree with those findings, again  
24 keep in mind the only one that knew the  
25 condition was Mr. Shaw. Cumberland didn't know

1 what his condition was. So if you disagree with  
2 those findings, go to Dr. Oplinger and say hey,  
3 they send me to some guy here, I had to do this,  
4 you know, I can't squat, this is about as low as  
5 I can do, I can do the job, doctor, can you  
6 check me out, doctor, tell me what I can do,  
7 tell me what I can't do, tell me what the  
8 company can do to help me do my job. Mr. Shaw  
9 didn't do that. Why didn't he do that? Ask  
10 yourself, because Dr. Oplinger would never,  
11 would never have cleared him to carry, lift,  
12 stand, and walk for prolonged periods of time  
13 based on his condition.

14 That's why he didn't do that. If Mr. Shaw  
15 disagreed with the physical requirements and  
16 said, "Hey, I can do my job, but I need a little  
17 bit of assistance right now here," All right,  
18 what do you need. Well, you know, I can't  
19 climb. I can't climb those stairs. It really  
20 bothers my knee. Okay, we can accommodate that.  
21 You don't have to climb. But when you go back  
22 into deliberations ask yourself how do you  
23 accommodate walking eight hours a day? How do  
24 you accommodate standing eight hours a day?  
25 How do you accommodate bending? How do you

1 accommodate squatting? That's the job. That's  
2 what everyone else is doing. An employer  
3 doesn't have to change the physical requirements  
4 of a job for one employee. An employer doesn't  
5 have to reassign those duties to another  
6 employee. The purpose of accommodation is to  
7 help that employee do their job, and that's the,  
8 next part of this, that's the next part. That's  
9 the next part of this is the accommodation.  
10 It's up to Mr. Shaw to give notice to the  
11 company that he wanted an accommodation.

12 Now, you heard, you saw the letter, you'll  
13 see some of these exhibits. Modify my job to  
14 what I really do. At the end of the testimony  
15 with Mr. Shaw he admitted that there's nothing  
16 to modify. Those were the assigned duties.  
17 Those were the physical requirements. What's to  
18 modify at this point? Now, Mr. Sheldon  
19 testified that he wanted to do something with  
20 Mr. Shaw. What Mr. Shaw wanted was he was  
21 stubborn, he wanted his job, he wanted the  
22 situation left alone, he wanted to work the way  
23 he was working. He didn't want any interference  
24 from anybody telling him he can't do the job  
25 that he's been doing. That's not the right

1 answer. If there's obviously something that's  
2 causing an employee some kind of difficulty and  
3 it comes back to that employee can't do the  
4 essential functions of the job, are you as an  
5 employer going to turn a blind eye to a medical  
6 opinion and use judgment on your own and say  
7 okay, you know, just keep on going, Ricky, keep  
8 on going until one day we have to call in an  
9 ambulance to take you out of there or until you  
10 drive that forklift and you hit someone because  
11 your reflexes are slower, or until a pallet  
12 drops or until you drop a pallet.

13 Those were their concerns. It's for him  
14 primarily and also for the people that he had an  
15 obligation to, but his stubbornness wouldn't  
16 even let him see that he had an obligation to  
17 other people. So when you deliberate ask  
18 yourself what did he ask for an accommodation?  
19 what kind of accommodation? But Mr. Sheldon  
20 tried to offer him. Now, I know in the cross  
21 examination, and cross examination can be tough  
22 and, you know, it's certainly not a comfortable  
23 position to be in, and then there were a couple  
24 of times when Mr. Shaw had an outburst, and that  
25 was okay. I mean, that's what happens

1 sometimes. But that outburst made me see that  
2 day that I could hear him talking to Mr. Sheldon  
3 when Mr. Sheldon was saying to him, you know,  
4 how about doing something else, and he said,  
5 "With these hands?" well, what more could the  
6 company do? I mean, they would be willing to do  
7 anything to keep this employee if that employee  
8 doesn't want it and only wants what he can't  
9 currently have at that moment.

10 well, that's not an accommodation. That's  
11 not reasonable. He wanted them to fire him, lay  
12 him off, leave the situation alone. That's not  
13 reasonable. What's reasonable is work with us,  
14 tell us what you need, go to your doctor, bring  
15 the forms to your doctor, have your doctor talk  
16 to walker, have walker and your doctor come up  
17 with a third doctor that everyone agrees on and  
18 have them examine you. We want you back.  
19 Cumberland, if they wanted to discriminate  
20 against Ricky Shaw, would they have kept his job  
21 open for almost seven months beyond Family  
22 Medical Leave Act? They're only required to  
23 keep it open for twelve weeks.

24 They kept that job for seven months, and  
25 not only that, but when they did send a letter

1 to him, and it apparently crossed in the mail,  
2 that was earlier than September 17th, they still  
3 brought him back for an evaluation on September  
4 17th. why would they want to continue putting  
5 this man through evaluations, for what purpose  
6 if they were going to try to get rid of him?  
7 They wanted to save him. It makes no sense, and  
8 that's what common sense is. Retaliation. Ask  
9 yourself what have you heard about retaliation?  
10 Retaliation is that Mr. Shaw asked for an  
11 accommodation and the company retaliated against  
12 him and from that there was an adverse  
13 employment action, tell you about an adverse  
14 employment action. where's the evidence of  
15 that? what did they do? what did Cumberland  
16 do?

17 The only thing that Cumberland did was they  
18 saw an employee, a valued employee whom they  
19 hadn't seen struggling before. They used  
20 judgment. They sought advice. They sent him to  
21 someone that could then tell them could he do  
22 his job. They didn't know. You heard the  
23 testimony. They didn't know whether it was  
24 going to come back that he could or he couldn't.  
25 They waited for those results. The results came

1 back. Now, you heard Mr. Russo talk about OSHA.  
2 Nobody said anything about OSHA, but you know  
3 something. What's telling in those social  
4 security documents that you'll be able to look  
5 at is Mr. Shaw knew, he wrote this himself, "I  
6 lost my job because I could not bend per OSHA  
7 requirements, because of the combination of my  
8 bad knee and my bad back." That's what happened  
9 here. Now, if Cumberland didn't want Mr. Shaw  
10 and was discriminating against him, would they  
11 have sent him that final letter with the "we  
12 have to terminate the employment, but please, we  
13 invite you to reapply, come back to us," and he  
14 could have come back to Cumberland.

15 You heard every witness testify they would  
16 have taken, except for Mr. Kline, they would  
17 have taken him back today even with this  
18 lawsuit. Why? Because he's a great employee.  
19 Now, you heard Dr. Oplinger. By April we're  
20 looking at knee replacement. Yes, it is  
21 Mr. Shaw's decision to delay that, and that's  
22 fine. He could have had it then and probably  
23 gotten back to work sooner with probably  
24 accommodation.

25 You heard Dr. Oplinger, he wasn't walking

1 with a cane, he was doing great, he was doing  
2 well, he was able to climb stairs, something  
3 that Mr. Shaw told you he hasn't been able to do  
4 in that period of time. So he delayed it.  
5 Okay, so he delayed it, but he had it done in  
6 `08, and by July of `09 he was doing great.  
7 When I asked him why didn't you go back, what  
8 was his answer? He had already filed a lawsuit  
9 and he didn't feel comfortable to. So he could  
10 have mitigated his damages by coming back. The  
11 company would have taken him back, but for  
12 Mr. Shaw, who knew what his condition was, knew  
13 what his limitations were, knew that he couldn't  
14 perform the essential functions of that job and  
15 just wanted to push through it until when, until  
16 who knows, until he hurt himself or someone  
17 else?

18 That's on him. That's not on Cumberland.  
19 Cumberland never regarded him disabled. If they  
20 had they would not have sent him for that  
21 evaluation, they would not have kept his job  
22 open for seven months. They would not have  
23 invited him to reapply at the end to come back.  
24 You'll have all of the exhibits in front of you,  
25 you'll be able to go through them all and make



1 your own determination based on what you recall  
2 of the testimony and of the evidence. I have  
3 always since I started practicing have really  
4 believed in the jury system, and I believe in  
5 the jury system because as hard as it is as  
6 you're sitting there wondering whether you're  
7 going to get picked or not, you honestly answer  
8 questions, you know it's a commitment of your  
9 time that you're giving up to hear a case and  
10 decide a case between two people, and this is  
11 what this is about. This one is a corporation,  
12 makes no difference. It's about two people.

13 Your attention to this case has been  
14 unbelievable. It has just restored in me the  
15 belief that our system is not the best system,  
16 but it's, you know what, it's better than any  
17 other system in this world, and I truly believe  
18 and Cumberland believes that you will do what is  
19 the right thing when you go back into  
20 deliberation and come up with your verdict.

21 I would like to thank you on my own behalf  
22 and on behalf of Cumberland Truck Equipment  
23 Company for the attention and the time and the  
24 days that you have given to this case, and I  
25 wish you a great weekend and a great summer.

1 Thank you.

2 THE COURT: Thank you very much, Ms. Saltz.

3 MR. RUSSO: Now I get to say good afternoon.

4 This will be quick. Chuck Hoffman saw Ricky,  
5 who as Ricky testified was walking slowly at  
6 that time. The mere fact that they believe he  
7 was more disabled than he was is a perceived  
8 disability. When Ricky goes and asks for his  
9 accommodation, this again, Ms. Saltz is right,  
10 don't leave your common sense at the door. We  
11 all probably have been in a situation where we  
12 do what we have to do to get a job done, and his  
13 job changed and Ricky simply said again let me  
14 do what I'm doing and have been for the last  
15 four and a half years without incident,  
16 discipline, or anybody stopping me, open and  
17 noticeable, to everyone's notice, and  
18 interestingly they didn't even respond. They  
19 didn't respond in writing to him. They had a  
20 conversation, but then she says we sent him for  
21 a second evaluation.

22 I want you to remember self preservation  
23 again. Remember that first evaluation that  
24 they relied on and went back to management to  
25 discuss? It wasn't even done by a doctor.

1 They did a second evaluation so they could kind  
2 of get real authority for what they were doing,  
3 but by now, by now, by now Ricky said, "Let me  
4 do what I want to do. Let me do what I've been  
5 doing," we don't like that. We don't want to  
6 buck the system. The accommodation, the judge  
7 is going to tell you what reasonable  
8 accommodation is, and think about those  
9 elements. What did I ask Cumberland to do?  
10 Just let me do what I'm doing.

11 How unreasonable is that? But they had  
12 already made their mind up by this point. By  
13 the time Ricky said, "Let me do what I want to  
14 do and what I've been doing," and what Tim and  
15 Pat had been with him doing, that you all saw  
16 him do, they made a decision, you're out of  
17 here. This is their own document, folks, dated  
18 allegedly the same date after they sent out that  
19 termination letter, the internal document says  
20 we terminated him on the day he asked for  
21 accommodation.

22 All the disability testimony you've heard?  
23 Months, months, months after the evaluation.  
24 So again could Ricky do that job on that day?  
25 I think the record is pretty clear with that.

1 Dr. Oplinger said, if you remember the  
2 testimony, he wouldn't have recommended that  
3 Ricky go back to CTE after his leave, that that  
4 was kind of the thing, it probably wasn't  
5 something he'd recommend. So again this idea  
6 that his job was open for him is more self  
7 preservation than anything else, and again we  
8 think that when I asked and you make a decision  
9 that quick, you've retaliated against me. Thank  
10 you.

11 THE COURT: Thank you very much, Mr. Russo.

12 MR. RUSSO: Thank you, Your Honor.

13 THE COURT: Ladies and gentlemen -- actually  
14 if you don't mind taking that down.

15 MR. RUSSO: I'm sorry, Your Honor.

16 THE COURT: Not a problem. I prefer not to  
17 move around during closing arguments because I  
18 don't want to distract you from the attention  
19 that I know you're giving both counsel. Ladies  
20 and gentlemen, at this time we'll take a short  
21 break so that we can all use the restroom, and  
22 let's reconvene at 12:15 for my instructions on  
23 the law, and I believe your lunch orders have  
24 been placed or are being placed. All right?  
25 we're in recess. Ms. McKinney, would you escort

1 the jury? And again let's keep this as brief as  
2 possible.

3 (Recess taken at 12:06 p.m.)

4 (Jury charge began at 12:23 p.m.)

5 THE COURT: Please be seated. Ladies and  
6 gentlemen, now that you have heard all of the  
7 evidence that is to be received in this trial  
8 and each of the arguments of counsel, it is my  
9 duty to instruct you about the applicable law.  
10 We have written instructions that we will  
11 distribute to you at this time. You can follow  
12 with me page by page, or you can put the  
13 instructions to the side and just listen to me  
14 give them to you, but at this time I'll ask that  
15 the instructions be distributed, the written  
16 instructions be distributed to the members of  
17 the jury.

18 (Brief pause.)

19 THE COURT: Ladies and gentlemen, you have  
20 two duties as a jury. Your first duty is to  
21 decide the facts from the evidence in this case.  
22 This is your job and yours alone. Your second  
23 duty is to apply the law as I will state it and  
24 to apply it to the facts as you find them from  
25 the evidence in the case. Do not single out one

1 instruction as stating the law, but consider the  
2 instructions as a whole. You are not to be  
3 concerned about the wisdom of any rule of law  
4 stated by me. You must follow and apply the  
5 law, regardless of any opinion you may have as  
6 to what the law ought to be. It would be a  
7 violation of your sworn duty to base any part of  
8 your verdict upon any view or opinion of the law  
9 other than that given in these instructions of  
10 the court, just as it would be a violation of  
11 your sworn duty as the judges of the facts to  
12 base your verdict upon anything but the evidence  
13 received in the case.

14 Counsel have quite properly referred to  
15 some of the governing rules of law in their  
16 arguments. If there is any difference between  
17 the law as stated by the lawyers and the law as  
18 stated in these instructions, you are to be  
19 governed by the instructions given to you by the  
20 court. Nothing I say in these instructions and  
21 nothing I said or did during the trial is meant  
22 to indicate any opinion on my part about what  
23 the facts are or about what your verdict should  
24 be. You, not I, have the duty to determine the  
25 facts and the verdict in this case. You must

1 perform your duty as jurors without bias or  
2 prejudice as to any party.

3 The law does not permit you to be  
4 controlled by sympathy, prejudice, or public  
5 opinion. The parties expect that you will  
6 carefully and impartially consider all of the  
7 evidence, follow the law as it is now being  
8 given to you, and reach a just verdict  
9 regardless of the consequences. The law shows  
10 no favoritism to parties in any court  
11 proceeding. This case is to be considered and  
12 determined by you in the same impartial way as  
13 you would consider a case, consider and  
14 determine a case between two private  
15 individuals.

16 In this case CTE is a corporation, and as  
17 such it can only act through its officers,  
18 employees, and agents. However, that fact  
19 should have no bearing on your verdict in this  
20 case, and in the eyes of the law both  
21 individuals and corporations are equal and both  
22 are entitled to be judged by the same standards  
23 of fairness and impartiality. Unless you are  
24 otherwise instructed the evidence in the case  
25 consists of the following: the testimony of the

1 witnesses, regardless of who called the witness;  
2 and documents and other things received as  
3 exhibits regardless of who may have produced  
4 them. The mere fact that the plaintiff has  
5 brought this lawsuit is not in any way evidence  
6 that the defendant is liable. The following  
7 things are not evidence: statements, arguments,  
8 and questions of the lawyers for the parties in  
9 this case; objections by the lawyers; any  
10 testimony I tell you to disregard; and anything  
11 you may see or hear about this case outside the  
12 courtroom.

13 If a witness is asked a question that  
14 contains an assertion of fact, you may not  
15 consider the assertion as evidence of that fact.  
16 However, when both sides stipulate or agree on  
17 the existence of a fact, you must, unless  
18 otherwise instructed, accept the stipulation and  
19 regard that agreed upon fact as proved. Any  
20 evidence to which I have sustained an objection  
21 and evidence that I have ordered stricken must  
22 be entirely disregarded. You are to base your  
23 verdict only on the evidence received in the  
24 case. In your consideration of the evidence  
25 received, however, you are not limited to the



1 bald statements of the witnesses or to the bald  
2 assertions in the exhibits. In other words, you  
3 are not limited solely to what you see and hear  
4 as the witnesses testify or as the exhibits are  
5 admitted. You are permitted to draw from the  
6 facts which you find have been proved such  
7 reasonable inferences as you feel are justified  
8 in light of your experience and common sense.

9 There is nothing particularly different in  
10 the way that a juror should consider the  
11 evidence in a trial from that in which any  
12 reasonable and careful person would deal with  
13 any very important question that must be  
14 resolved by examining facts, opinions, and  
15 evidence. You are expected to use your good  
16 sense in considering and evaluating the evidence  
17 in the case. Use the evidence only for those  
18 purposes for which it has been received, and  
19 give the evidence a reasonable and fair  
20 construction in light of your common knowledge  
21 of the natural tendencies and inclinations of  
22 human beings.

23 There are two types of evidence that you  
24 may use in reaching your verdict, direct  
25 evidence and circumstantial evidence. An

1 example of direct evidence is when a witness  
2 testifies about something that the witness knows  
3 through his or her own senses, something the  
4 witness has seen, felt, touched, heard, or did.  
5 If a witness testified that he saw it raining  
6 outside and you believed him, that would be  
7 direct evidence that it was raining.

8 Circumstantial evidence is proof of one or  
9 more facts from which you could find another  
10 fact. If someone walked into this courtroom  
11 wearing a raincoat, covered with drops of water,  
12 and carrying a wet umbrella, that would be  
13 circumstantial evidence from which you could  
14 conclude that it was raining. You should  
15 consider both kinds of evidence that are  
16 presented to you. The law makes no distinction  
17 in the weight to be given either direct or  
18 circumstantial evidence. You are to decide how  
19 much weight to give any evidence.

20 In deciding what the facts are you may have  
21 to decide what testimony you believe and what  
22 testimony you do not believe. You are the sole  
23 judges of the credibility of the witness.  
24 Credibility means whether a witness is worthy of  
25 belief. You may believe everything a witness

1 says, only part of it, or none of it. In  
2 deciding what to believe you may consider a  
3 number of factors, including: 1) the  
4 opportunity and ability of the witness to see  
5 hear or know the things the witness testified  
6 to; 2) the quality of the witness's  
7 understanding and memory; 3) the witness's  
8 appearance and manner while testifying; 4)  
9 whether the witness has an interest in the  
10 outcome of the case or any motive, bias, or  
11 prejudice; 5) whether the witness is  
12 contradicted by anything the witness said or  
13 wrote before trial or by other evidence; 6) how  
14 reasonable the witness's testimony is when  
15 considered in light of other evidence that you  
16 believe; and 7) any other factors that bear on  
17 believability.

18 Inconsistencies or discrepancies in the  
19 testimony of a witness or between the testimony  
20 of different witnesses may or may not cause you  
21 to discredit such testimony. Two or more  
22 persons seeing an event may see or hear it  
23 differently. In weighing the effect of a  
24 discrepancy always consider whether it pertains  
25 to a matter of importance or an unimportant

1 detail and whether the discrepancy results from  
2 innocent error or intentional falsehood. After  
3 making your own judgment you will give the  
4 testimony of each witness such weight, if any,  
5 that you may think it deserves.

6 In short, you may accept or reject the  
7 testimony of any witness in whole or in part.  
8 A witness may be discredited or impeached by  
9 contradictory evidence or by evidence that at  
10 some other time the witness has said or done  
11 something or has failed to say or do something  
12 that is inconsistent with the witness's present  
13 testimony. If a witness is shown to have  
14 knowingly testified falsely about any material  
15 matter, you have a right to distrust the  
16 witness's other testimony and you may accept or  
17 reject the testimony of that witness in whole or  
18 in part. An act or omission is knowingly done  
19 if it was done voluntarily and intentionally and  
20 not because of mistake, accident, or other  
21 innocent reason.

22 Some of the testimony before you is  
23 presented in the form of a deposition, which is  
24 the sworn testimony of a witness taken before  
25 trial. The witness is placed under oath and

1 swears to tell the truth, and lawyers for each  
2 party may ask questions. A court reporter is  
3 present and records the questions and answers.  
4 This is part of the pretrial discovery, and each  
5 party is entitled to take depositions.  
6 Deposition testimony is entitled to the same  
7 consideration and is to be judged insofar as  
8 possible in the same way as if the witness had  
9 been present to testify. In other words, you  
10 may consider testimony given at a deposition  
11 according to the same standards you would use to  
12 evaluate testimony given at trial.

13 You have heard testimony containing  
14 opinions from two economists, actually an  
15 economist and an accountant, Mr. Kern and  
16 Mr. Staller. In weighing this opinion testimony  
17 you may consider their qualifications, the  
18 reasons for their opinions, and the reliability  
19 of the information supporting those opinions, as  
20 well as the factors I have previously mentioned  
21 for weighing the testimony of any other witness.  
22 The opinions of Mr. Kern and Mr. Staller should  
23 receive whatever weight and credit, if any, you  
24 think appropriate, given all the other evidence  
25 in the case. In deciding whether to accept or

1     rely upon the opinions of Mr. Kern and/or  
2     Mr. Staller you may consider any bias that they  
3     may have, including any bias that may arise from  
4     evidence that they have been or will be paid for  
5     reviewing the case and testifying.

6             Your decision on the facts of this case  
7     should not be determined by the number of  
8     witnesses testifying for or against another  
9     party. You may find that the testimony of a  
10    small number of witnesses as to any fact is more  
11    credible than the testimony of a larger number  
12    of witnesses to the contrary. What is more  
13    important is how believable the witnesses were  
14    and how much weight you think their testimony  
15    deserves. You should consider all the facts and  
16    circumstances in evidence to determine which of  
17    the witnesses you choose to believe or not  
18    believe.

19            As I have told you, you, the jury, are the  
20    sole judges of the facts of this case. This is  
21    a civil case. Mr. Shaw has accused Cumberland  
22    Truck Equipment Company of discriminating  
23    against him on the basis of a perceived  
24    disability, failing to accommodate the  
25    disability that it perceived him as having, and

1     retaliating against him for requesting  
2     accommodation. Cumberland Truck Equipment  
3     Company denies Mr. Shaw's accusations and it  
4     raises various additional allegations in its  
5     defense. Mr. Shaw has the burden to prove his  
6     claim by a preponderance of the evidence. If  
7     Mr. Shaw should fail to establish any essential  
8     element of his claim by a preponderance of the  
9     evidence, then you should find for CTE.

10       Established by a preponderance of the  
11     evidence means to prove that something is more  
12     likely so than not so. To say it differently,  
13     if you were to put the evidence favorable to  
14     Mr. Shaw and the evidence favorable to CTE on  
15     opposite sides of the scales of justice,  
16     Mr. Shaw would have to make the scales tip  
17     somewhat on his side. If Mr. Shaw fails to meet  
18     this burden the verdict must be for the CTE. If  
19     you find after considering all the evidence that  
20     a claim or fact is more likely so than not so,  
21     then that claim or fact has been proved by a  
22     preponderance of the evidence.

23       In deciding whether any fact has been  
24     proved by a preponderance of the evidence in  
25     this case you may, unless otherwise instructed,

1 consider the testimony of all witnesses,  
2 regardless of who may have called them, and all  
3 exhibits received in evidence, regardless of who  
4 may have produced them. You may have heard of  
5 the term proof beyond a reasonable doubt. That  
6 is a stricter standard that applies in criminal  
7 cases. It does not apply in civil cases such as  
8 this. You should therefore put it out of your  
9 minds.

10 The Americans with Disabilities Act. In  
11 this case Mr. Shaw has made a claim of  
12 disability based discrimination under a federal  
13 law known as the Americans with Disabilities  
14 Act, or ADA for short. The purpose of the  
15 Americans with Disabilities Act is to provide a  
16 clear and comprehensive national policy to  
17 eliminate discrimination in the work place  
18 against individuals with disabilities. Under  
19 the ADA an employer may not discriminate against  
20 a person with a disability if that person is  
21 able to perform the essential functions of the  
22 job with reasonable accommodation if necessary.

23 The ADA's definition of disability includes  
24 not only those persons who are actually  
25 disabled, but also those who are regarded as



1 having a disability by their employer. As you  
2 listen to my instructions keep in mind that some  
3 of the terms I will use and you will need to  
4 apply, including disability, have special  
5 meanings under the ADA. I will explain how  
6 these terms are defined by the ADA, so please  
7 remember to consider the specific definitions I  
8 give you rather than using your own opinion of  
9 what these terms mean.

10 Mr. Shaw claims that CTE violated the ADA  
11 by engaging in employment decisions that were  
12 adverse to him because it regarded him as  
13 disabled. Specifically Mr. Shaw alleges that  
14 CTE didn't allow him to work on the basis of a  
15 purportedly perceived disability, failed to  
16 accommodate that disability, the disability that  
17 it perceived him as having and retaliated  
18 against him for requesting accommodation. CTE  
19 denies Mr. Shaw's claims. Further, CTE asserts  
20 that Mr. Shaw was not able to perform the  
21 essential functions of his job and that he would  
22 have posed a threat to himself or others in the  
23 work place if he had continued working. CTE  
24 also claims that Mr. Shaw failed to mitigate his  
25 damages. I will now provide you with more

1 detailed instructions on Mr. Shaw's first claim,  
2 that CTE prevented him from working because it  
3 regarded him as disabled.

4 In order for Mr. Shaw to recover on this  
5 claim he must prove that CTE intentionally  
6 discriminated against him. This means that he  
7 must prove by a preponderance of the evidence  
8 that his perceived disability was a motivating  
9 factor in CTE's decision to engage in employment  
10 actions that were adverse to Mr. Shaw. To  
11 prevail on this claim Mr. Shaw must prove all of  
12 the following by a preponderance of the  
13 evidence. First, that he had a disability  
14 within the meaning of the ADA. I remind you  
15 that the ADA's definition of having a disability  
16 includes being regarded as having a disability  
17 by one's employer.

18 Second, that he was a qualified individual,  
19 able to perform the essential functions of the  
20 job. I will provide you with more explicit  
21 instructions on the meaning of the term  
22 "qualified" in a moment. And third, that  
23 Mr. Shaw's perceived disability was a motivating  
24 factor in CTE 's decision to engage in  
25 employment action that was adverse to Mr. Shaw.

1 Mr. Shaw must prove that CTE acted with the  
2 intent to discriminate on the basis of a  
3 disability. However, Mr. Shaw is not required  
4 to prove that CTE acted with the particular  
5 intent to violate his federal rights under the  
6 ADA. In showing that his disability was a  
7 motivating factor for CTE's action Mr. Shaw is  
8 not required to prove that his disability was  
9 the sole motivation or even the primary  
10 motivation for CTE's decision.

11 Mr. Shaw need only prove that the  
12 disability played a motivating part in CTE's  
13 decision, even though other factors may also  
14 have motivated CTE. As used in this instruction  
15 the perceived disability was a motivating factor  
16 if it played a part or played a role in CTE's  
17 decision to engage in employment action, in an  
18 employment action that was adverse to Mr. Shaw.  
19 If you find that CTE's treatment of Mr. Shaw was  
20 motivated by both discriminatory and lawful  
21 reasons, you must decide whether Mr. Shaw is  
22 entitled to damages.

23 I will now provide you with further  
24 instructions on ADA's definition of disability,  
25 which as I have already told you applies not

1     only to individuals who are actually disabled,  
2     but also to individuals who are regarded as  
3     having a disability by their employer. Mr. Shaw  
4     is regarded as disabled within the meaning of  
5     the ADA if he proves any of the following by a  
6     preponderance of the evidence: 1) Mr. Shaw had a  
7     physical or mental impairment that did not  
8     substantially limit his ability to perform a  
9     major life activity such as walking or working  
10    but was treated by CTE as having an impairment  
11    that did so limit his ability; or 2) Mr. Shaw  
12    did not have any impairment, but CTE treated him  
13    as having an impairment that substantially  
14    limited his ability to perform a major life  
15    activity such as walking or working.

16         Also, Mr. Shaw can meet the requirement of  
17    being regarded as disabled if he was  
18    discriminated against because of an actual or  
19    perceived impairment even if the impairment was  
20    not or was not perceived to limit a major life  
21    activity. I will now define some of the other  
22    terms I have just used in more detail. Again I  
23    remind you to consider the specific definitions  
24    I give you and not to use your own opinions as  
25    to what these terms mean. The term "physical

1 impairment" means any condition which prevents  
2 the body from functioning normally. An  
3 impairment substantially limits a person's  
4 ability to perform a major life activity such as  
5 walking if it prevents or restricts him from  
6 performing that activity, walking, such as  
7 walking, compared to the average person in the  
8 general population. An impairment substantially  
9 limits a person's ability to work if it  
10 significantly prevents or restricts him from  
11 performing a broad class or range of jobs, not  
12 just one particular job, as compared to the  
13 average person with comparable training, skills,  
14 and ability.

15 Major life activities are activities that  
16 are of central importance to everyday life. I  
17 instruct you that walking and working are both  
18 major life activities within the meaning of the  
19 ADA. Finally, to prove that he was a qualified  
20 individual means that Mr. Shaw must show that he  
21 had the skill, experience, education, and other  
22 requirements for the warehouse worker position,  
23 and that he could do the job's essential  
24 functions, either with or without reasonable  
25 accommodations. If Mr. Shaw cannot establish

1 that he is qualified to, that he is qualified to  
2 perform the essential functions of the warehouse  
3 worker position even with reasonable  
4 accommodations, then Mr. Shaw is not a qualified  
5 individual under the ADA. If that is the case  
6 then you must return a verdict for CTE even if  
7 the reason why Mr. Shaw is not qualified is  
8 solely as a result of his disability.

9 The ADA does not require an employer to  
10 hire or retain an individual who cannot perform  
11 the job with or without an accommodation. In  
12 this case Mr. Shaw claims that he was able to  
13 perform the essential functions of the warehouse  
14 position if it was modified. It is Mr. Shaw's  
15 burden to prove by a preponderance of the  
16 evidence that he was able to perform the  
17 essential functions of the job. If Mr. Shaw  
18 could not perform certain functions, then it is  
19 Mr. Shaw's burden to show that these certain  
20 functions were not essential to the warehouse  
21 position.

22 In determining whether Mr. Shaw could  
23 perform the essential functions of the warehouse  
24 job you should keep in mind that not all job  
25 functions are essential. The term "essential

functions" does not include the marginal functions of the position. Essential functions are a job's fundamental duties. In deciding whether a function is essential to the warehouse position at CTE some factors that you may consider include the following: 1) whether the performance of the function is the reason that the job exists; 2) the amount of time spent on the job performing the function; 3) whether there are a limited number of employees available to do the function; 4) whether the function is highly specialized; 5) whether an employee in the job is hired for his or her expertise or ability to perform the function; 6) CTE's judgment about what functions are essential to the job; 7) written job descriptions for the job; 8) the consequences of not requiring an employee to perform the function; 9) whether others who held the same position performed the same function; 10) the experience of Mr. Shaw and other employees who have held or currently hold the same or similar positions.

No one factor is necessarily controlling. You should consider all of the evidence in

1 deciding whether any particular function is  
2 essential to the job. In assessing whether  
3 Mr. Shaw was qualified to perform the essential  
4 functions of the warehouse worker position you  
5 should consider Mr. Shaw's abilities as they  
6 existed in February 2007 when CTE placed  
7 Mr. Shaw on leave. There has been evidence in  
8 this case that in filing for social security  
9 disability benefits Mr. Shaw represented that he  
10 was disabled and unable to work. The fact that  
11 a person is unable to work for purposes of  
12 receiving social security disability benefits  
13 does not necessarily mean that he is not a  
14 qualified individual under the Americans with  
15 Disabilities Act.

16 Unlike the ADA, social security does not  
17 take into account whether a person may be able  
18 to perform the essential functions of a job with  
19 reasonable accommodations. However, to the  
20 extent relevant in the context of these  
21 instructions you may consider Mr. Shaw's  
22 statements in support of disability benefits in  
23 determining whether he was a qualified  
24 individual. I remind you that a qualified  
25 individual can perform the essential functions



1 of the job either with or without reasonable  
2 accommodations. Hence, if you find that  
3 Mr. Shaw was otherwise qualified but was not  
4 able to fulfill all of the essential functions  
5 of job without accommodation, then you must  
6 consider whether there were reasonable  
7 accommodations which CTE could have made which  
8 would have been enabled Mr. Shaw to fulfill the  
9 essential functions that he could not otherwise  
10 fulfill.

11 I will explain the term "reasonable  
12 accommodation" more fully in my instructions on  
13 Mr. Shaw's second claim. Mr. Shaw's second  
14 claim is that CTE failed to provide a reasonable  
15 accommodation for the disability that it  
16 perceived. The ADA provides that an employer  
17 may not deny employment opportunities to a  
18 qualified individual with a disability if that  
19 denial is based on the need of the employer to  
20 make reasonable accommodations to that  
21 individual's disability. To prevail on this  
22 claim Mr. Shaw must prove all of the following  
23 by a preponderance of the evidence.

24 First, that he has a disability within the  
25 meaning of the ADA. Second, that he is a

1 qualified individual able to perform the  
2 essential functions of the job. Third, that CTE  
3 was informed of the need for an accommodation  
4 for Mr. Shaw due to a disability. There is no  
5 requirement that a request be made for a  
6 specific accommodation. It is enough to satisfy  
7 this element that CTE was informed of Mr. Shaw's  
8 basic need for an accommodation. Fourth, that  
9 providing the accommodation at issue in this  
10 case, that is modifying Mr. Shaw's job, would  
11 have been reasonable, meaning that the costs of  
12 that accommodation would not have clearly  
13 exceeded its benefits. And fifth, that CTE  
14 failed to provide the accommodation or any other  
15 reasonable accommodation.

16 Under the ADA a reasonable accommodation  
17 may include, but is not limited to, the  
18 following: 1) reallocating or redistributing  
19 marginal job functions that an employee with a  
20 disability is unable to perform; 2) altering  
21 when and how, when and/or how a job function is  
22 performed. Note, however, that a reasonable  
23 accommodation does not require an employer to do  
24 any of the following: 1) change or eliminate any  
25 essential job function; 2) shift any essential

1 job function to other employees; 3) create a new  
2 position for an employee with a disability. The  
3 intent of the ADA is that there be an  
4 interactive process between the employer and the  
5 employee in order to determine whether there is  
6 a reasonable accommodation that would allow the  
7 employee to perform the essential functions of a  
8 job. Both the employer and the employee must  
9 cooperate in this interactive process in good  
10 faith once the employer has been informed of the  
11 employee's request for a reasonable  
12 accommodation. Neither party can win this case  
13 simply because the other did not cooperate in  
14 the interactive process, but you may consider  
15 whether a party cooperated in this process in  
16 good faith in evaluating the merits of that  
17 party's claim that a reasonable accommodation  
18 did or did not exist.

19 Mr. Shaw's third claim is that CTE  
20 retaliated against him because he engaged in  
21 conduct that is protected by the ADA,  
22 specifically asking for an accommodation. To  
23 prevail on this claim Mr. Shaw must prove all  
24 of the following by a preponderance of the  
25 evidence. First, that Mr. Shaw engaged in an

1 activity protected by the ADA such as requesting  
2 an accommodation for a disability. Second, that  
3 CTE subjected Mr. Shaw to a materially adverse  
4 employment action at the time or after the  
5 protected conduct took place. And third, that  
6 there was a causal connection between CTE's  
7 adverse employment action and Mr. Shaw's  
8 protected activity. Concerning the first  
9 element, Mr. Shaw need not prove the merits of  
10 his request for an accommodation. He merely  
11 needs to prove that he was acting under a good  
12 faith belief that his right to be free to  
13 request an accommodation was violated.

14 Concerning the second element, the term  
15 "materially adverse" means that Mr. Shaw must  
16 show that the employment action was serious  
17 enough that it well might have discouraged a  
18 reasonable worker from engaging in protected  
19 activity. Concerning the third element, causal  
20 connection, that connection may be shown in many  
21 ways. For example, you may or may not find that  
22 there is a sufficient connection through timing,  
23 if CTE's action followed shortly after CTE  
24 became aware of Mr. Shaw's protected activity.  
25 Causation is, however, not necessarily ruled out

1 by a more extended passage of time. As another  
2 example, causation may or may not be proven by  
3 antagonism shown toward Mr. Shaw or a change in  
4 demeanor toward Mr. Shaw. Mr. Shaw can recover  
5 for retaliation even if he did not have a  
6 disability within the meaning of the ADA. With  
7 respect to his retaliation claim the question is  
8 not whether there was a disability, but whether  
9 CTE retaliated against him for engaging in  
10 protected conduct. Ultimately you must decide  
11 whether Mr. Shaw's protected activity had a  
12 determinative effect on CTE's employment action.

13 Determinative effect means that if not for  
14 Mr. Shaw's protected activity CTE would not have  
15 decided to engage in the employment action that  
16 was adverse to Mr. Shaw. In this case CTE  
17 claims that it prevented Mr. Shaw from working  
18 because he would have created a significant risk  
19 of substantial harm to himself and to others in  
20 the work place. Your verdict must be for CTE if  
21 CTE has proven both of the following elements by  
22 a preponderance of the evidence. First, that  
23 CTE prevented Mr. Shaw from working because he  
24 posed a direct threat to the health or safety of  
25 himself and/or others in the work place, and

1 second, that this direct threat could not be  
2 eliminated by providing a reasonable  
3 accommodation as I have previously defined that  
4 term for you.

5 A direct threat means a significant risk of  
6 substantial harm to the health or safety of the  
7 person or other persons that cannot be  
8 eliminated by a reasonable accommodation. The  
9 determination that a direct threat exists must  
10 have been based on a specific personal  
11 assessment of Mr. Shaw's ability to safely  
12 perform the essential functions of the job.  
13 This assessment of Mr. Shaw's ability must have  
14 been based on either a reasonable medical  
15 judgment that relied on the most current medical  
16 knowledge or on the best available objective  
17 evidence.

18 In determining whether Mr. Shaw would have  
19 created a significant risk of substantial harm  
20 you should consider the following factors: 1)  
21 how long any risk would have lasted; 2) the  
22 nature of the potential harm and how severe the  
23 harm would be if it occurred; 3) the likelihood  
24 that the harm would have occurred; and 4)  
25 whether the harm would be likely to recur. I am

1 now going to instruct you on damages. The fact  
2 that I am instructing you on how to award  
3 damages does not mean that I have any opinion on  
4 whether or not CTE should be held liable. If  
5 you find by a preponderance of the evidence that  
6 CTE violated Mr. Shaw's rights under the ADA by  
7 making an adverse employment decision on the  
8 basis that it regarded him as disabled or by  
9 failing to accommodate his disability or by  
10 retaliating against him for engaging in  
11 protected conduct, then you must consider the  
12 issue of compensatory damages.

13 You must award Mr. Shaw an amount that will  
14 fairly compensate him for any injury he actually  
15 sustained as a result of CTE's conduct. The  
16 damages that you award must be fair  
17 compensation, no more and no less. The award of  
18 compensatory damages is meant to put Mr. Shaw in  
19 the position he would have occupied if the  
20 discrimination and/or retaliation had not  
21 occurred. Mr. Shaw has the burden of proving  
22 damages by a preponderance of the evidence  
23 Mr. Shaw must show that the injury would not  
24 have occurred without CTE's actions. Mr. Shaw  
25 must also show that CTE's actions played a

1 substantial part in bringing about the injury  
2 and that the injury was either a direct result  
3 or a reasonably probable consequence of CTE's  
4 actions.

5 This test, a substantial part in bringing  
6 about the injury, is to be distinguished from  
7 the test that you must employ in determining  
8 whether CTE's actions were motivated by  
9 discrimination. In other words, even assuming  
10 that the CTE's actions were motivated by  
11 discrimination, Mr. Shaw is not entitled to  
12 damages for an injury unless CTE's  
13 discriminatory actions actually played a  
14 substantial part in bringing about that injury.

15 In determining the amount of any damages  
16 that you decide to award you should be guided by  
17 common sense. You must use sound judgment in  
18 fixing an award of damages, drawing reasonable  
19 inference from the facts in evidence. You may  
20 not award damages based upon sympathy,  
21 speculation, or guess work. You may award  
22 damages for any pain, suffering, inconvenience,  
23 mental anguish, or loss of enjoyment of life  
24 that Mr. Shaw experienced as a consequence of  
25 CTE's allegedly unlawful actions. No evidence



1 of the monetary value of such intangible things  
2 as pain and suffering has been or need be  
3 introduced evidence. There is no exact standard  
4 for fixing the compensation to be awarded for  
5 these elements of damage. Any award you make  
6 should be fair in light of the evidence  
7 presented at the trial.

8 I instruct you that in awarding  
9 compensatory damages you are not to award  
10 damages for the amount of wages that Mr. Shaw  
11 would have earned either in the past or in the  
12 future if he had continued in employment with  
13 CTE. These elements of recovery of wages that  
14 Mr. Shaw would have received from CTE are called  
15 back pay and front pay. Back pay and front pay  
16 are to be awarded separately under instructions  
17 I will soon give you, and any amounts for back  
18 pay and front pay are to be entered separately  
19 on the verdict form. You may award damages for  
20 monetary losses that Mr. Shaw may suffer in the  
21 future as a result of CTE's allegedly unlawful  
22 conduct.

23 Where a victim of discrimination has been  
24 terminated by an employer and has sued that  
25 employer for discrimination, he may find it more

1 difficult to be employed in the future or may  
2 have to take a job that pays less than the  
3 amount he would have earned if the act of  
4 discrimination had not occurred. That element  
5 of damages is distinct from front pay, the  
6 amount of wages Mr. Shaw would have earned in  
7 the future from CTE if he had retained his job.  
8 As I instructed you previously, Mr. Shaw has the  
9 burden of proving damages by a preponderance of  
10 the evidence, but the law does not require that  
11 Mr. Shaw prove the amount of his losses with  
12 mathematical precision. It requires only as  
13 much definiteness and accuracy as circumstances  
14 permit.

15       You are instructed that Mr. Shaw has a duty  
16 under the law to mitigate his damages. That  
17 means that Mr. Shaw must take advantage of any  
18 reasonable opportunity that may have existed  
19 under the circumstances to reduce or minimize  
20 the loss or damage caused by CTE. It is CTE's  
21 burden to prove that Mr. Shaw has failed to  
22 mitigate. So if CTE persuades you by a  
23 preponderance of the evidence that Mr. Shaw  
24 failed to take advantage of an opportunity that  
25 was reasonably available to him, then you must

1     reduce the amount of Mr. Shaw's damages by the  
2     amount that could have been reasonably obtained  
3     if he had taken advantage of such an  
4     opportunity.

5             In assessing damages you must not consider  
6     attorney's fees or the costs of litigating this  
7     case. Attorney's fees and costs, if relevant at  
8     all, are for the court and not the jury to  
9     determine. Therefore attorney's fees and costs  
10    should play no part in your calculation of any  
11    damages. I will now instruct you on back pay  
12    and front pay. You may award as actual damages  
13    an amount that reasonably compensates Mr. Shaw  
14    for any lost wages and benefits, taking into  
15    consideration any increases in salary and  
16    benefits, including pension, that Mr. Shaw would  
17    have received from CTE had he not been the  
18    subject of CTE's complaint of conduct. Back pay  
19    damages, if any, apply from the time CTE told  
20    Mr. Shaw that he had to stop working until the  
21    date of your verdict.

22            If you award back pay you are instructed to  
23    deduct from the back pay figure whatever wages  
24    Mr. Shaw has obtained from other employment  
25    during this period. However, please note that

1 you should not deduct social security benefits,  
2 unemployment compensation, and pension benefits  
3 from an award of back pay. I remind you that as  
4 I have already explained, Mr. Shaw has a duty to  
5 mitigate his damages. So if CTE persuades you  
6 by a preponderance of the evidence that Mr. Shaw  
7 failed to obtain substantially equivalent job  
8 opportunities that were reasonably available to  
9 him, you must reduce the awarded damages by the  
10 amount of wages that he reasonably would have  
11 earned if he had obtained those opportunities.  
12 You may determine separately a monetary amount  
13 equal to the present value of any future wages  
14 and benefits that Mr. Shaw would have  
15 reasonably, would reasonably have earned from  
16 CTE had he not been prevented from working for  
17 the period from the date of your verdict through  
18 a reasonable period of time in the future.

19 From this figure you must subtract the  
20 amount of earnings and benefits Mr. Shaw will  
21 receive from other employment during that time.  
22 Mr. Shaw has the burden of proving these damages  
23 by a preponderance of the evidence. If you find  
24 that Mr. Shaw is entitled to recovery of future  
25 earnings from CTE, then you must reduce any

1 award by the amount of the expenses that  
2 Mr. Shaw would have incurred in making those  
3 earnings. You must also reduce any award to its  
4 present value by considering the interest that  
5 Mr. Shaw could earn on the amount of the award  
6 if he made a relatively risk free investment.

7 The reason you must make this reduction is  
8 because an award of an amount representing  
9 future loss of earnings is more valuable to  
10 Mr. Shaw if he receives it today than if it were  
11 received at the time in the future when it would  
12 have been earned. It is more valuable because  
13 Mr. Shaw can earn interest on it for the period  
14 between the date of the award and the date he  
15 would have earned the money. Thus you should  
16 decrease the amount of any award for loss of  
17 future earnings by the amount of interest that  
18 Mr. Shaw can earn on that amount in the future.

19 I will now instruct you on punitive  
20 damages. Mr. Shaw claims that the acts of CTE  
21 were done with malice or reckless indifference  
22 to his federally protected rights and that as a  
23 result there should be an award of damages that  
24 are called punitive damages. A jury may award  
25 punitive damages to punish a defendant or to

1 deter the defendant and others like the  
2 defendant from committing similar conduct in the  
3 future. An award of punitive damages is  
4 permissible in this case only if you find by a  
5 preponderance of the evidence that a management  
6 official of CTE personally acted with malice or  
7 reckless indifference to Mr. Shaw's federally  
8 protected rights. An act is done with malice if  
9 a person knows that it violates a federal law  
10 prohibiting discrimination and does it anyway.  
11 An act is done with reckless indifference if a  
12 person knows that it may violate the law and  
13 does it any way, but even if you make a finding  
14 that there has been an act of discrimination  
15 with malice or reckless disregard of Mr. Shaw's  
16 federal rights, you cannot award punitive  
17 damages if CTE proves by a preponderance of the  
18 evidence that it made a good faith attempt to  
19 comply with the law by adopting policies and  
20 procedures designed to prevent unlawful  
21 discrimination such as that suffered by  
22 Mr. Shaw.

23 An award of punitive damages is  
24 discretionary. In other words, if you find that  
25 the legal requirements for punitive damages are

1 satisfied, then you may decide to award punitive  
2 damages or you may decide not to award them. I  
3 will now discuss some considerations that should  
4 guide your exercise of this discretion. If you  
5 have found the elements permitting punitive  
6 damages as discussed in this instruction, then  
7 you should consider the purposes of punitive  
8 damages. The purposes of punitive damages are  
9 to punish a defendant for a malicious or  
10 reckless disregard of federal rights or to deter  
11 a defendant and others like the defendant from  
12 doing similar things in the future or both.

13 Thus you may consider whether to award  
14 punitive damages to punish CTE. You should also  
15 consider whether actual damages, standing alone,  
16 are sufficient to deter or prevent CTE from  
17 again performing any wrongful acts it may have  
18 performed. Finally, you should consider whether  
19 an award of punitive damages in this case is  
20 likely to deter others from performing wrongful  
21 acts similar to those that you find CTE has  
22 committed. If you decide to award punitive  
23 damages then you should also consider the  
24 purpose of punitive damages in deciding the  
25 amount of punitive damages to award. That is

1 in deciding the amount of punitive damages you  
2 should consider the degree to which CTE should  
3 be punished for its wrongful conduct and the  
4 degree to which an award of one sum or another  
5 will deter CTE or others from committing similar  
6 wrongful acts in the future.

7 The extent to which a particular amount of  
8 money will adequately punish a defendant and the  
9 extent to which a particular amount will  
10 adequately deter or prevent future misconduct  
11 may depend upon the defendant's financial  
12 resources. Therefore if you find that punitive  
13 damages should be awarded against CTE, you may  
14 consider the financial resources of CTE in  
15 fixing the amount of such damages. I have  
16 instructed you that Mr. Shaw is seeking damages  
17 for front and back pay, for emotional suffering,  
18 and for punitive damages. You may not award  
19 Mr. Shaw damages for front pay, emotional  
20 suffering, or for punitive damages if CTE proves  
21 by a preponderance of the evidence the following  
22 elements. First, that CTE knew that an  
23 accommodation was needed, and second, that CTE  
24 made a good faith effort in consultation with  
25 Mr. Shaw to identify and make a reasonable



1 accommodation that would allow Mr. Shaw to  
2 fulfill the essential functions of the position  
3 in question and would not constitute an undue  
4 hardship on the operation of CTE's business.

5 Such a good faith effort is not a defense  
6 to an award of damages for back pay. If you  
7 return a verdict for Mr. Shaw, but Mr. Shaw has  
8 failed to prove actual injury and therefore is  
9 not entitled to compensatory damages, then you  
10 must award nominal damages of one dollar. A  
11 person whose federal rights were violated is  
12 entitled to a recognition of that violation even  
13 if he suffered no actual injury. Nominal  
14 damages of one dollar are designed to  
15 acknowledge the deprivation of a federal right  
16 even when no actual injury occurred. However,  
17 if you find actual injury you must award  
18 compensatory damages as I instructed you rather  
19 than nominal damages.

20 Ladies and gentlemen, I want to reiterate  
21 that my instructions as to the measure of  
22 damages are given only for your guidance in the  
23 event that you should find in favor of Mr. Shaw  
24 on the question of discrimination or retaliation  
25 by a preponderance of the evidence and in accord

1 with the other instructions. These instructions  
2 should not be considered as any indication of  
3 which party is entitled to your verdict. When  
4 you retire to the jury room to deliberate you  
5 may take with you these instructions, your  
6 notes, and the exhibits that the court has  
7 admitted into evidence. You should select one  
8 member of the jury as your foreperson. That  
9 person will preside over the deliberations and  
10 speak for you here in open court.

11 You have two main duty as jurors. The  
12 first one is to decide what the facts are from  
13 the evidence that you saw and heard here in  
14 court. Your second duty is to take the law that  
15 I have given you, apply it to the facts, and  
16 decide if, under the appropriate burden of  
17 proof, the parties have established their  
18 claims. It is my job to instruct you about the  
19 law and you are bound by the oath that you took  
20 at the beginning of the trial to follow the  
21 instructions that I give you, even if you  
22 personally disagree with them. This includes  
23 the instructions that I gave you before and  
24 during the trial, and these instructions.

25 All the instructions are important and you

1 should consider them together as a whole.  
2 Perform these duties fairly. Do not let any  
3 bias, sympathy, or prejudice that you may feel  
4 toward one side or the other influence your  
5 decision in any way. As jurors you have a duty  
6 to consult with each other and to deliberate  
7 with the intention of reaching a verdict. Each  
8 of you must decide the case for yourself, but  
9 only after a full and impartial consideration of  
10 all of the evidence with your fellow jurors.  
11 Listen to each other carefully.

12 During the course of your deliberations you  
13 should feel free to reexamine your own views and  
14 to change your opinion based upon the evidence,  
15 but you should not give up your honest  
16 conviction about the evidence just because of  
17 the opinions of your fellow jurors, nor should  
18 you change your minds just for the purpose of  
19 obtaining enough votes for a verdict. Remember  
20 at all times that you are not partisans. You  
21 are the judges, judges of the facts. Your sole  
22 interest is to seek the truth from the evidence  
23 in the case. Your verdict must be based solely  
24 upon the evidence received in the case. Nothing  
25 you have seen or read outside of court may be

1 considered. Nothing that I have said or done  
2 during the course of this trial is intended in  
3 any way to suggest to you what I think your  
4 verdict should be. What the verdict shall be is  
5 the exclusive duty and responsibility of the  
6 jury.

7 Remember, if you elected to take notes  
8 during the trial, your notes should be used only  
9 as memory aids. You should not give your notes  
10 greater weight than your independent  
11 recollection of the evidence. You should rely  
12 upon your independent, your own independent  
13 recollection of the evidence or lack of evidence  
14 and you should not be unduly influenced by the  
15 notes of other jurors. Notes are not entitled  
16 to any more weight than the memory or impression  
17 of each juror.

18 Your verdict must represent the considered  
19 judgment of each juror. In order for you as a  
20 jury to return a verdict each juror must agree  
21 to the verdict. Your verdict must be unanimous.  
22 A verdict form has been prepared for your  
23 convenience. At this time, Ms. McKinney, would  
24 you please pass out the verdict form?

25 (Brief pause.)

1 THE COURT: Ladies and gentlemen, this  
2 verdict form is a series of questions. You  
3 should address these questions in the order that  
4 they are provided, without skipping questions  
5 unless the instructions in the verdict form  
6 directs you to do so, and the answer to each  
7 question must be the unanimous answer of the  
8 jury. The first question deals with disability,  
9 the second deals with qualified individual, and  
10 the third question is discrimination, which is  
11 the first claim in the case.

12 The second -- or the fourth question,  
13 failure to accommodate, is the second claim in  
14 the case, and question 5 is retaliation, and  
15 that is the third question in the case.  
16 Questions 1 and 2 are preliminary to the first  
17 two claims, discrimination and failure to  
18 accommodate. You'll note that if you answer  
19 "no" to the first question you then proceed to  
20 question 5 which, the retaliation claim which  
21 applies regardless of whether you -- which must  
22 be answered regardless of whether you respond in  
23 the affirmative to question number 1.

24 Then questions 6, 7, 8, and 9 deal with the  
25 issue of damages, which you should answer if you

1 reach those questions in accordance with the  
2 instructions. Your foreperson will write the  
3 unanimous answer of the jury in the space  
4 provided by each question. When you have  
5 reached unanimous agreement as to your verdicts  
6 you will have your foreperson date and sign the  
7 form and seal it in an envelope that will be  
8 provided to you. Then you will inform the  
9 bailiff that you have reached a unanimous  
10 verdict. You should retain the sealed envelope  
11 until you return to the courtroom and your  
12 foreperson will deliver the sealed envelope here  
13 in open court.

14 Now, you now have seven copies of the  
15 verdict form. Please only put one signed form  
16 in the envelope. Only one. When you start  
17 deliberating do not talk to the bailiff, to me,  
18 or to anyone but each other about the case. If  
19 it becomes necessary during your deliberations  
20 to communicate with the court you may send a  
21 note signed by your foreperson or by one or more  
22 members of the jury through the bailiff. The  
23 bailiff will give the note to me and I will  
24 respond as soon as I can. Please keep in mind  
25 that we will be unable to give you an immediate

1 response to any written questions that you  
2 present.

3 First I have to discuss it with the, we  
4 have to assemble, I have to discuss it with the  
5 attorneys and determine whether or not we can in  
6 fact provide you with a substantive response to  
7 your question. There are certain questions that  
8 we may simply not be able to answer for you. So  
9 as I say here I may have to talk to the lawyers  
10 about what you have asked, and so it may take  
11 some time to get back to you. So please  
12 recognize there will be a delay between when you  
13 submit a question and when we will be able to  
14 get back to you.

15 No member of the jury should ever attempt  
16 to communicate with the court by any means other  
17 than a signed writing, and the court will never  
18 communicate with any member of the jury  
19 concerning the evidence, your opinions, or the  
20 deliberations other than in writing or orally  
21 here in open court. Bear in mind that you are  
22 never to reveal to any person, not even to the  
23 court, how the jury stands, numerically or  
24 otherwise, on the verdict until after you have  
25 reached a unanimous verdict. You will note from

1 the both about to be taken by the plaintiffs  
2 that they, too, as well as all other persons are  
3 forbidden to communicate in any way or manner  
4 with any member of the jury concerning the  
5 evidence, your opinions, or the deliberations.

6 Keep in mind that the dispute between the  
7 parties is for them a most serious matter. They  
8 and the court rely upon you to give full and  
9 conscientious deliberation and consideration to  
10 the issues and evidence before you. Consider  
11 all the surrounding circumstances, the  
12 probabilities or improbabilities of the  
13 testimony, and what counsel and the court have  
14 said. You should try to reach what is a just,  
15 true, and correct solution of the controversy  
16 submitted to you.

17 In reaching your conclusion you should be  
18 guided solely by the evidence which has been  
19 presented to you, the inferences drawn from the  
20 evidence, and the instructions of the court on  
21 the law. You should not be influenced by fear,  
22 favor, prejudice, or sympathy. All of the  
23 parties stand equally before the court, and each  
24 is entitled to the same fair and impartial  
25 treatment at your hands. At this time the court



1 asks counsel beyond what we have discussed  
2 during the course of our charge conference  
3 whether there has been a failure to charge on  
4 any substantial matter of law.

5 MR. CROCENZI: No, Your Honor.

6 MS. SALTZ: No, Your Honor.

7 THE COURT: All right. Ladies and  
8 gentlemen, let me confess the obvious to you,  
9 and that is that I'm under the weather and as a  
10 result of that we will take deliberations today  
11 until 5:00. I have to call it a day at 5:00.  
12 That is in no way, shape, or form intended to  
13 limit the time you spend deliberating on this  
14 matter. The parties deserve your full and  
15 complete attention to all the issues presented,  
16 and to the extent that you are unable to reach a  
17 verdict by 5:00 we'll simply return tomorrow  
18 morning and you will continue your  
19 deliberations.

20 At this time would the bailiffs please step  
21 forward so that I may administer the oath? If  
22 you will please raise your right hand? Do you  
23 swear or affirm to keep this jury in some  
24 private and convenient place and that you will  
25 not suffer anyone to speak to them or speak to

1       them yourself without leave of court, except to  
2       ask them if they have agreed upon their verdict?  
3       Do you so swear or affirm? If so, please say,  
4       "I do."

5               (Bailiffs answered affirmatively.)

6               THE COURT: All right, thank you very much.  
7       Ladies and gentlemen, I now invite you back to  
8       the jury deliberation room so that you may  
9       consume your lunch and begin your deliberations.  
10      It will be a few minutes before we can get all  
11      of the exhibits back to you, but they'll come  
12      back to you shortly. Ms. McKinney, you may  
13      escort the jury.

14              (Jury deliberations began at 1:25 p.m.)

15              THE COURT: Counsel, please be seated.  
16      Mr. Russo, Mr. Crocenzi, Mr. Saltz, I just want  
17      to say that it was a pleasure having you in the  
18      courtroom. You performed admirably on behalf of  
19      your respective client. It's not a complement I  
20      always give. I want you to understand that I  
21      really appreciate the professionalism that you  
22      exhibited during the course of the court  
23      proceedings, and I apologize to the extent that  
24      I interrupted the proceedings with my own  
25      coughing, but it's always a pleasure to try a

1 case with attorneys who know what they're doing,  
2 and you clearly do. So I very much appreciate  
3 the efforts that you have extended on behalf of  
4 your clients. They were very well represented  
5 in today's proceeding.

6 MS. SALTZ: Thank you, Your Honor.

7 THE COURT: So thank you for that. Have you  
8 been able to agree on the exhibits to be  
9 submitted to the jury?

10 MS. SALTZ: I think we're doing to do that  
11 very quickly.

12 MR. CROCENZI: When Ms. McKinney gets back.

13 MS. SALTZ: She wants us to just quickly run  
14 through and give her the originals.

15 THE COURT: All right, and with the issue of  
16 the expert reports, have we addressed how that's  
17 going to -- how do you agree that that will be  
18 handled?

19 MS. SALTZ: Well, it's part of the record  
20 that's not going out to the jury.

21 MR. CROCENZI: That's in there as one  
22 defense exhibit, the short-term disability.

23 MS. SALTZ: Right, that's not going out to  
24 the jury as well.

25 MR. CROCENZI: The rest of it is going back.

1 THE COURT: All right. Very good. Just  
2 meet with Ms. McKinney and give her that  
3 information. If we do get a question, and this  
4 is one of those cases where because of the  
5 complex nature of the instructions and the law  
6 there may be some questions, please give Ms.  
7 McKinney a cell phone number where you can be  
8 reached and try to be within five minutes of the  
9 courthouse so that we can quickly get back to  
10 the jury. They know that it's going to take a  
11 little while to get back to them, but please  
12 give a cell phone, you don't have to stay in the  
13 courtroom, go get some lunch, walk around, but  
14 give us a place where, give us a number where we  
15 can reach you. All right?

16 MS. SALTZ: Your Honor, thank you.

17 THE COURT: Thank you very much. We are in  
18 recess.

19 (Recess taken at 1:26 p.m.)

20 (Question from the jury at 3:35 p.m.)

21 THE COURT: Please be seated. As counsel is  
22 aware we have a question from the jury. It  
23 appears as though they are on an issue of  
24 damages. Specifically the question reads, "what  
25 expenses are we responsible for reducing from

1 front pay? Please clarify expenses." And the  
2 reference is to page 37 of the instructions, and  
3 I'm wondering if counsel have had an opportunity  
4 to review the question in context of the  
5 instructions and if you have any proposed  
6 response to this question.

7 MR. CROCENZI: I'm sorry, Your Honor, I'm  
8 still thinking about whether --

9 THE COURT: Let's go off the record.

10 (Discussion held off the record.)

11 THE COURT: While we were off the record  
12 counsel agreed that there are no expenses, there  
13 is no evidence of expenses in the record that  
14 should be deducted from an award of future  
15 earnings based upon an expense that Mr. Shaw  
16 would have incurred in making those earnings.  
17 Obviously there are other instructions that  
18 apply to mitigation among other issues, and so  
19 for those reasons we'll bring the jury in and  
20 the court will so instruct the jury.

21 (Brief pause.)

22 (Jury seated at 3:38 p.m.)

23 THE COURT: Ladies and gentlemen, please be  
24 seated. You presented a question, and the  
25 question is, "What expenses are we responsible

1 for reducing from front pay?" And the reference  
2 is to the top of page 37 of the instructions,  
3 and that reads as follows, "If you find that  
4 Mr. Shaw is entitled to recovery of future  
5 earnings from CTE, then you must reduce any  
6 award by the amount of the expenses that  
7 Mr. Shaw would have incurred in making those  
8 earnings." That is an instruction for  
9 circumstances that are actually not applicable  
10 to this case and so I've discussed this with  
11 counsel and they agree that there really are,  
12 there is no evidence in the record of any  
13 expenses from which you must reduce the award,  
14 and by that I mean specifically the expenses  
15 that Mr. Shaw would have incurred in making  
16 those earnings, those future earnings from CTE.

17 There's simply no evidence in the record of  
18 any such expenses and in essence that reduction  
19 element is inapplicable in this case. To speed  
20 things up we thought it would be easier if we  
21 just brought you in and I explained that to you  
22 on the record. I believe I've responded to your  
23 question and so I'll simply ask you to return to  
24 the deliberation room and complete your  
25 deliberations in due course. Thank you very

1 much, ladies and gentlemen. Ms. McKinney, you  
2 may escort the jury.

3 (Deliberations continued at 3:39 p.m.)

4 THE COURT: Please be seated. Ladies and  
5 gentlemen, I was reasonably certain that I had  
6 accurately instructed the jury with respect to  
7 what we discussed prior to their returning to  
8 the courtroom and I didn't call you to side bar  
9 in part because I didn't want to give you what  
10 cold I have, but to the extent that you have any  
11 concerns with the court's instructions to the  
12 jury I want to give you an opportunity to put it  
13 on the record. Do you have any concerns?

14 MR. CROCENZI: No, Your Honor.

15 MR. RUSSO: No, Your Honor.

16 MS. SALTZ: No, Your Honor.

17 THE COURT: All right. Thank you very much.  
18 Again just be in cell phone range. It appears  
19 as though the jury is working their way through  
20 the form pretty well. We are in recess.

21 (Recessed taken from 3:40 to 4:24 p.m.)

22 THE COURT: Please be seated. The court has  
23 been advised that the jury has a verdict. I  
24 would just encourage the parties to, and I know  
25 you will abide by our rule of courtroom decorum

1 when the verdict comes in and discuss and  
2 address the issues created by the verdict  
3 outside the courtroom. Ms. McKinney, would you  
4 escort the jury?

5 (Jury seated at 4:26 p.m.)

6 THE COURT: Good afternoon, ladies and  
7 gentlemen. Please be seated. Ms. Schoffstall,  
8 you are the foreperson, is that correct?

9 JURY FOREPERSON: Yes.

10 THE COURT: If you would please remain  
11 standing? I have two questions for you. First,  
12 has the jury reached a verdict?

13 JURY FOREPERSON: We have.

14 THE COURT: And is that verdict unanimous?

15 JURY FOREPERSON: It is.

16 THE COURT: Would you please hand the  
17 envelope to the courtroom deputy? And you may  
18 be seated.

19 (Brief pause.)

20 THE COURT: All right. The form, the  
21 verdict form is in order, and now, ladies and  
22 gentlemen, I'm just simply going to publish your  
23 verdict, which means I'm simply going to read  
24 each question and the answer provided by the  
25 jury. With respect to the first question, do



1 you find by a preponderance of the evidence that  
2 Mr. Shaw had a disability within the meaning of  
3 the ADA, the jury has indicated yes. Question  
4 2, do you find by a preponderance of the  
5 evidence that Mr. Shaw, with or without  
6 reasonable accommodations, could perform the  
7 essential functions of his job, the jury has  
8 answered yes. Question 3, do you find by a  
9 preponderance of the evidence that Mr. Shaw's  
10 disability was a motivating factor in CTE's  
11 decision to engage in an adverse employment  
12 action against Mr. Shaw, the jury has indicated  
13 yes.

14 Question 4-A, do you find by a  
15 preponderance of the evidence that CTE was aware  
16 of the need for an accommodation for Mr. Shaw  
17 and that CTE failed to provide a reasonable  
18 accommodation to Mr. Shaw, the jury has answered  
19 yes. "B", do you find by a preponderance of the  
20 evidence that providing an accommodation to  
21 Mr. Shaw would cause an undue hardship on CTE's  
22 business, the jury has indicated no. Question  
23 5-A, do you find by a preponderance of the  
24 evidence that Mr. Shaw engaged in conduct  
25 protected by the ADA, e.g. requesting an

1 accommodation, the jury has indicated yes. "B",  
2 do you find by a preponderance of the evidence  
3 that at the time the protected conduct took  
4 place or thereafter CTE engaged in an adverse  
5 employment action against Mr. Shaw because of  
6 the protected conduct, the jury has checked yes.

7 Question 6, damages. Do you find by a  
8 preponderance of the evidence that Mr. Shaw  
9 suffered damages as a result of CTE's actions,  
10 the jury has indicated yes. Question 7, do you  
11 find by a preponderance of the evidence that  
12 Mr. Shaw failed to mitigate his damages, the  
13 jury has indicated no. Question 8, compensatory  
14 damages, back pay, front pay, what amount of  
15 compensatory damages, if any, do you award to  
16 Mr. Shaw, the jury has indicated \$30,000. What  
17 amount of back pay, if any, do you award to  
18 Mr. Shaw, the jury has indicated \$98,500. What  
19 amount of front pay, if any, do you award to  
20 Mr. Shaw, the jury has indicated \$175,000.

21 Question 9, do you find by a preponderance  
22 of the evidence that a management official of  
23 CTE personally acted with malice or reckless  
24 indifference to Mr. Shaw's rights, the jury has  
25 indicated yes. Do you find by a preponderance

1 of the evidence -- do you find by a  
2 preponderance of the evidence that CTE made a  
3 good faith attempt to comply with the law by  
4 adopting policies and procedures designed to  
5 prevent unlawful discrimination such as that  
6 suffered by Mr. Shaw, there is no space in the  
7 verdict form for an answer to that question. C,  
8 what amount of punitive damages if any do you  
9 award to Mr. Shaw, the answer to that question  
10 is \$50,000, and it is duly signed by the jury  
11 foreperson.

12 There appears to have been an error in my  
13 part with respect to question 9-B. Because  
14 there is no response to question 9-B there  
15 should be a space for yes or no. Although it  
16 may be obvious what your answer is to that  
17 question I would like to have the jury respond  
18 to it appropriately and make sure that they have  
19 complied with that portion of the verdict form.  
20 Counsel, would you please approach?

21 (Side bar at 4:32 p.m.)

22 THE COURT: I think the answer is pretty  
23 obvious but I do want to give them the  
24 opportunity to respond in the affirmative with  
25 respect to the --

1 MS. SALTZ: Absolutely, Your Honor.

2 THE COURT: Then I'm going to handwrite in  
3 on this verdict form "yes or no" and ask that  
4 the jury complete the form and answer question B  
5 before they answer question C.

6 MS. SALTZ: Okay.

7 THE COURT: All right? Is that acceptable?

8 MS. SALTZ: Yes, it is. Thank you.

9 THE COURT: All right. Very good.

10 (Side bar concluded at 4:33 p.m.)

11 THE COURT: Ladies and gentlemen, as I  
12 indicated while I was reading the verdict form  
13 the error is ours. There was no space for an  
14 answer to question 9-B, and again that reads,  
15 "Do you find by a preponderance of the evidence  
16 that CTE made a good faith attempt to comply  
17 with the law by adopting policies and procedures  
18 designed to prevent unlawful discrimination such  
19 as that suffered by Mr. Shaw," and you proceed  
20 then to the amount of punitive damages, which is  
21 section C, only if you answer "No" to that  
22 question. If you answer "Yes" then you proceed  
23 to the final instruction. So with that in mind  
24 I'm going to leave the form in its current  
25 position but ask that you go back, answer

1 question 9-B first, it may or may not change  
2 your answer to question 9-C, and we will return  
3 the verdict form in the envelope provided to the  
4 jury foreperson and ask that that question be  
5 answered and the form be completed. Counsel,  
6 anything further at this juncture?

7 MS. SALTZ: No, Your Honor.

8 MR. CROCENZI: No.

9 THE COURT: Ladies and gentleman, please  
10 retire to the jury deliberation room and take  
11 care of that extra matter. Thank you.

12 (Jury recessed at 4:34 p.m.)

13 THE COURT: Please be seated. I would ask  
14 that you stay in the courtroom. Counsel, I'll  
15 be asking either of you if you would like a poll  
16 of the jury.

17 MS. SALTZ: I will, Your Honor.

18 THE COURT: All right.

19 (Jury seated at 4:38 p.m.)

20 THE COURT: Ms. Schoffstall, I do have two  
21 questions for you. It just so happens the same  
22 two questions I asked you before. Have you  
23 reached a unanimous verdict?

24 JURY FOREPERSON: Yes.

25 THE COURT: And Have you been able to

1 complete the entire form?

2 JURY FOREPERSON: Yes.

3 THE COURT: All right, thank you. would you  
4 please hand the envelope to Ms. McKinney?

5 (Brief pause.)

6 THE COURT: All right. The verdict form is  
7 in order as amended, and again my apologies for  
8 not providing an appropriate yes or no space  
9 below question 9-B. The answers to the  
10 questions are the same until we get to question  
11 9-B, do you find by a preponderance of the  
12 evidence that CTE made a good faith attempt to  
13 comply with the law by adopting policies and  
14 procedures designed to prevent unlawful  
15 discrimination such as that suffered by  
16 Mr. Shaw, the answer the jury has provided is  
17 no.

18 what amount of punitive damages, if any, do  
19 you award to Mr. Shaw, the amount is \$50,000,  
20 and the form is duly signed by the foreperson  
21 and appropriately dated. The court finds that  
22 the verdict form is in order and at this time  
23 I'll ask counsel if they would like a poll of  
24 the jury.

25 MR. CROCENZI: No, Your Honor.

1 MS. SALTZ: Yes, Your Honor.

2 THE COURT: All right. Ms. McKinney,  
3 defense counsel has requested a poll of the  
4 jury. Ladies and gentlemen, counsel has  
5 exercised the right to poll the jury. During  
6 the poll the courtroom deputy will ask each of  
7 you to affirm individually each aspect of the  
8 verdict. So when called please stand and when  
9 asked by the courtroom deputy state your verdict  
10 with respect to the questions set forth on the  
11 verdict form. Ms. McKinney?

12 COURTROOM DEPUTY: Okay, in the matter of  
13 the United States District Court for the Middle  
14 District of Pennsylvania, in the matter of Ricky  
15 A. Shaw v. Cumberland Truck Equipment Company,  
16 civil action number 1:09-CV-0359, you have heard  
17 the verdict as published by the court, and I ask  
18 you, juror number 1, do you agree with the  
19 verdict form question number 1, answer yes --  
20 you'll have to stand, ma'am, I'm sorry.  
21 Question number 1, do you agree with the answer  
22 yes?

23 JUROR 1: Yes.

24 COURTROOM DEPUTY: Thank you. Question 2,  
25 do you agree with the answer yes?

1 JUROR 1: Yes.

2 COURTROOM DEPUTY: Question 3, do you agree  
3 with the answer yes?

4 JUROR 1: Yes.

5 COURTROOM DEPUTY: Question 4, do you agree  
6 with the --

7 THE COURT: 4-A.

8 COURTROOM DEPUTY: 4-A, do you agree with  
9 the answer yes?

10 JUROR 1: Yes.

11 COURTROOM DEPUTY: Question 4-B, do you  
12 agree with the answer no?

13 JUROR 1: That is correct.

14 COURTROOM: Thank you. Question 5-A, do you  
15 agree with the answer yes.

16 JUROR 1: Yes.

17 COURTROOM DEPUTY: 5-B, do you agree with  
18 the answer yes.

19 JUROR 1: Yes.

20 COURTROOM DEPUTY: Thank you. Question 6,  
21 do you agree with the answer yes?

22 JUROR 1: Yes.

23 COURTROOM DEPUTY: Thank you. Question 7,  
24 do you agree with the answer no.

25 JUROR 1: That is correct.



1           COURTROOM DEPUTY: Thank you. Question 8,  
2           compensatory damages of \$30,000, do you agree.

3           JUROR 1: Yes.

4           COURTROOM DEPUTY: Amount of back pay  
5           \$98,500, do you agree?

6           JUROR 1: Yes.

7           COURTROOM DEPUTY: Front pay \$175,000, do  
8           you agree?

9           JUROR 1: Yes.

10          COURTROOM DEPUTY: Question number 9, do you  
11          agree, 9-A, do you agree with the answer yes?  
12          Punitive damages?

13          JUROR 1: Yes.

14          COURTROOM DEPUTY: 9-B, the answer no?

15          JUROR 1: That is correct.

16          COURTROOM DEPUTY: And 9-C, punitive damages  
17          in the amount of \$50,000, do you agree?

18          JUROR 1: Yes.

19          COURTROOM DEPUTY: Great, thank you. Juror  
20          number 2, would you please stand? Do you agree  
21          with the answer yes to question number 1?

22          JUROR 2: I agree.

23          COURTROOM DEPUTY: Do you agree with the  
24          answer yes to two question number 2?

25          JUROR 2: I agree.

1 COURTROOM DEPUTY: Do you agree with the  
2 answer yes to question number 3?

3 JUROR 2: I agree.

4 COURTROOM DEPUTY: Do you agree with the  
5 answer yes to question number 4-A?

6 JUROR 2: I agree.

7 COURTROOM DEPUTY: Do you agree with the  
8 answer no to question number 4-B?

9 JUROR 2: I agree.

10 COURTROOM DEPUTY: Do you agree with the  
11 answer yes to question number 5-A?

12 JUROR 2: I agree.

13 COURTROOM DEPUTY: And the answer yes to  
14 question number 5-B?

15 JUROR 2: I agree.

16 COURTROOM DEPUTY: The answer yes to  
17 question number 6?

18 JUROR 2: I agree.

19 COURTROOM DEPUTY: The answer no to question  
20 number 7?

21 JUROR 2: I agree.

22 COURTROOM DEPUTY: The amount of  
23 compensatory damages under question 8 of  
24 \$30,000?

25 JUROR 2: I agree.

1 COURTROOM DEPUTY: The amount of back pay  
2 \$98,500?

3 JUROR 2: I agree.

4 COURTROOM DEPUTY: Thank you. \$175,000 for  
5 front pay?

6 JUROR 2: I agree.

7 COURTROOM DEPUTY: Thank you. Question  
8 number -- I'm sorry, there's just a little bit  
9 more. Question number 9-A, do you agree with  
10 the answer yes?

11 JUROR 2: I agree.

12 COURTROOM DEPUTY: Punitive damages,  
13 question number 9-B do you agree with the  
14 answer no?

15 JUROR 2: I agree.

16 COURTROOM DEPUTY: Okay. Question 9-C, do  
17 you agree with the punitive damages in the  
18 amount of \$50,000?

19 JUROR 2: I agree.

20 COURTROOM DEPUTY: Thank you, sir. You may  
21 be seated. Juror number 3, question number 1,  
22 do you agree with the answer yes?

23 JUROR 3: I agree.

24 COURTROOM DEPUTY: Question number 2, do you  
25 agree with the answer yes?

1 JUROR 3: I agree.

2 COURTROOM DEPUTY: Question number 3, do you  
3 agree with the answer yes?

4 JUROR 3: I agree.

5 COURTROOM DEPUTY: Question 4-A, do you  
6 agree with the answer yes?

7 JUROR 3: I agree.

8 COURTROOM DEPUTY: Question 4-B, do you  
9 agree with the answer no?

10 JUROR 3: I agree.

11 COURTROOM DEPUTY: Question number 5-A, do  
12 you agree with the answer yes?

13 JUROR 3: I agree.

14 COURTROOM DEPUTY: Question number 5-B, do  
15 you agree with the answer yes?

16 JUROR 3: I agree.

17 COURTROOM DEPUTY: Thank you. Question  
18 number 6, do you agree with the answer yes?

19 JUROR 3: I agree.

20 COURTROOM DEPUTY: Question number 7, do you  
21 agree with the answer no?

22 JUROR 3: I agree.

23 COURTROOM DEPUTY: Question number 8,  
24 compensatory damages of \$30,000, do you agree?

25 JUROR 3: I agree.

1           COURTROOM DEPUTY: Amount of back pay  
2     \$98,500, do you agree?

3           JUROR 3: I agree.

4           COURTROOM DEPUTY: Amount of front pay,  
5     \$175,000, do you agree?

6           JUROR 3: I agree.

7           COURTROOM DEPUTY: Question 9-A, do you  
8     agree with the answer yes?

9           JUROR 3: I agree.

10          COURTROOM DEPUTY: Question 9-B, do you  
11     agree with the answer no?

12          JUROR 3: I agree.

13          COURTROOM DEPUTY: Question 9-C, do you  
14     agree with the \$50,000 punitive damages?

15          JUROR 3: I agree.

16          COURTROOM DEPUTY: Thank you. Juror number  
17     4, question number 1, do you agree with the  
18     answer yes?

19          JUROR 4: Yes.

20          COURTROOM DEPUTY: Question number 2, do you  
21     agree with the answer yes?

22          JUROR 4: Yes.

23          COURTROOM DEPUTY: Question number 3, do you  
24     agree with the answer yes?

25          JUROR 4: Yes.

1 COURTROOM DEPUTY: Question number 4, do you  
2 agree with the answer yes?

3 JUROR 4: Yes.

4 COURTROOM DEPUTY: That was 4-A, excuse me.  
5 Do you agree 4-A?

6 JUROR 4: Yes.

7 COURTROOM DEPUTY: Question 4-B, do you  
8 agree with the answer no?

9 JUROR 4: Yes.

10 COURTROOM DEPUTY: Question number 5-A, do  
11 you agree with the answer yes?

12 JUROR 4: Yes.

13 COURTROOM DEPUTY: Question number 5-B, do  
14 you agree with the answer yes?

15 JUROR 4: Yes.

16 COURTROOM DEPUTY: Question number 6, do you  
17 agree with the answer yes?

18 JUROR 4: Yes.

19 COURTROOM DEPUTY: Question number 7, do you  
20 agree with the answer no?

21 JUROR 4: Yes.

22 COURTROOM DEPUTY: Question number 8,  
23 compensatory damages of \$30,000, do you agree?

24 JUROR 4: Yes.

25 COURTROOM DEPUTY: Question number 8, the

1 amount of back pay, \$98,500, do you agree?

2 JUROR 4: Yes.

3 COURTROOM DEPUTY: I'm sorry, question 8,  
4 front pay in the amount of \$175,000, do you  
5 agree?

6 JUROR 4: Yes.

7 COURTROOM DEPUTY: Question number 9-A, do  
8 you agree with the answer yes?

9 JUROR 4: Yes.

10 COURTROOM DEPUTY: Question number 9-B, do  
11 you agree with the answer no?

12 JUROR 4: Yes.

13 COURTROOM DEPUTY: Question number 9-C,  
14 punitive damages in the amount of \$50,000, do  
15 you agree?

16 JUROR 4: Yes.

17 COURTROOM DEPUTY: Thank you. Juror number  
18 5, if you would please stand? Question number  
19 1, do you agree with the answer yes?

20 JUROR 5: Yes I agree.

21 COURTROOM DEPUTY: Thank you. Question 2,  
22 do you agree with the answer yes?

23 JUROR 5: Yes.

24 COURTROOM DEPUTY: Question 3, do you agree  
25 with the answer yes?

1 JUROR 5: Yes.

2 COURTROOM DEPUTY: Question 4-A, do you  
3 agree with the answer yes?

4 JUROR 5: Yes.

5 COURTROOM DEPUTY: Question 4-B, do you  
6 agree with the answer no?

7 JUROR 5: I do agree.

8 COURTROOM DEPUTY: Question 5-A, do you  
9 agree with the answer yes?

10 JUROR 5: Yes.

11 COURTROOM DEPUTY: Question 5-C, do you  
12 agree with the answer yes?

13 JUROR 5: Yes.

14 COURTROOM DEPUTY: Question 6, do you agree  
15 with the answer yes?

16 JUROR 5: Yes.

17 COURTROOM DEPUTY: Question 7, do you agree  
18 with the answer no?

19 JUROR 5: Yes.

20 COURTROOM DEPUTY: Question 8, compensatory  
21 damages in the amount of \$30,000, do you agree?

22 JUROR 5: Yes, I do.

23 COURTROOM DEPUTY: Back pay in the amount of  
24 \$98,500, do you agree?

25 JUROR 5: I do.



1 COURTROOM DEPUTY: Front pay in the amount  
2 of \$175,000, do you agree?

3 JUROR 5: Yes.

4 COURTROOM DEPUTY: Question 9-A, do you  
5 agree with the answer yes?

6 JUROR 5: Yes.

7 COURTROOM DEPUTY: 9-B, do you agree with  
8 the answer no?

9 JUROR 5: Yes.

10 COURTROOM DEPUTY: And 9-C, the amount of  
11 punitive damages of \$50,000, do you agree?

12 JUROR 5: Yes.

13 COURTROOM DEPUTY: Thank you. Juror number  
14 6, question number 1, do you agree with the  
15 answer yes?

16 JUROR 6: Yes.

17 COURTROOM DEPUTY: Question number 2, do you  
18 agree with the answer yes?

19 JUROR 6: Yes.

20 COURTROOM DEPUTY: Question number 3, do you  
21 agree with the answer yes?

22 JUROR 6: Yes.

23 COURTROOM DEPUTY: Question number 4-A, do  
24 you agree with the answer yes?

25 JUROR 6: Yes.

1 COURTROOM DEPUTY: Question number 4-B, do  
2 you agree with the answer no?

3 JUROR 6: Yes.

4 COURTROOM DEPUTY: Question number 5-A, do  
5 you agree with the answer yes?

6 JUROR 6: Yes.

7 COURTROOM DEPUTY: Question number 5-B, do  
8 you agree with the answer yes?

9 JUROR 6: Yes.

10 COURTROOM DEPUTY: Question number 6, do you  
11 agree with the answer yes?

12 JUROR 6: Yes.

13 COURTROOM DEPUTY: Question number 7, do you  
14 agree with the answer no?

15 JUROR 6: Yes.

16 COURTROOM DEPUTY: Question 8, compensatory  
17 damages in the amount of \$30,000, do you agree?

18 JUROR 6: Yes.

19 COURTROOM DEPUTY: Back pay in the amount of  
20 \$98,500 under question 8, do you agree?

21 JUROR 6: Yes.

22 COURTROOM DEPUTY: And then amount of front  
23 pay of \$175,000 do you agree?

24 JUROR 6: Yes.

25 COURTROOM DEPUTY: Question 9-A, do you

1 agree with the answer yes?

2 JUROR 6: Yes.

3 COURTROOM DEPUTY: Do you agree to the  
4 answer no for 9-B?

5 JUROR 6: Yes.

6 COURTROOM DEPUTY: And 9-C, the amount of  
7 punitive damages of \$50,000 do you agree?

8 JUROR 6: Yes.

9 COURTROOM DEPUTY: Great, thank you. And  
10 juror number 7, question number 1, do you agree  
11 with the answer yes?

12 JUROR 7: Yes.

13 COURTROOM DEPUTY: Question number 2, do you  
14 agree with the answer yes?

15 JUROR 7: Yes.

16 COURTROOM DEPUTY: Question number 3, do you  
17 agree with the answer yes?

18 JUROR 7: Yes.

19 COURTROOM DEPUTY: Question number 4-A, do  
20 you agree with the answer yes?

21 JUROR 7: Yes.

22 COURTROOM DEPUTY: Question number 4-B, do  
23 you agree with the answer no?

24 JUROR 7: Yes.

25 COURTROOM DEPUTY: Question number 5-A, do

1 you agree with the answer yes?

2 JUROR 7: Yes.

3 COURTROOM DEPUTY: Question number 5-B, do  
4 you agree with the answer yes?

5 JUROR 7: Yes.

6 COURTROOM DEPUTY: Question number 6, do you  
7 agree with the answer yes?

8 JUROR 7: Yes.

9 COURTROOM DEPUTY: Question number 7, do you  
10 agree with the answer no?

11 JUROR 7: Yes.

12 COURTROOM DEPUTY: Question number 8,  
13 compensatory damages of \$30,000, do you agree?

14 JUROR 7: Yes.

15 COURTROOM DEPUTY: The amount of back pay,  
16 \$98,500 do you agree?

17 JUROR 7: Yes.

18 COURTROOM DEPUTY: Front pay, the amount of  
19 \$175,000 do you agree?

20 JUROR 7: Yes.

21 COURTROOM DEPUTY: Question number 9-A, do  
22 you agree with the answer yes?

23 JUROR 7: Yes.

24 COURTROOM DEPUTY: Question 9-B, do you  
25 agree with the answer no?

1 JUROR 7: Yes.

2 COURTROOM DEPUTY: And question 9-C, the  
3 amount of punitive damages of \$50,000, do you  
4 agree?

5 JUROR 7: Yes.

6 COURTROOM DEPUTY: Thank you.

7 THE COURT: Thank you, Ms. McKinney. The  
8 court will turn the original verdict form over  
9 to Ms. McKinney. It appearing that the jurors  
10 have reached a unanimous verdict, the clerk of  
11 court is directed to enter judgement in  
12 accordance with the verdict. Members of the  
13 jury, I want to extend my deep appreciation to  
14 you for the service that you have rendered. By  
15 participating in this process you have conferred  
16 one of the most fundamental protections of our  
17 democracy, the right to a fair and impartial  
18 jury.

19 On behalf of the United States judicial  
20 system I thank you. Before you are excused I  
21 want to speak with you briefly in the jury  
22 deliberation room. I would advise you that you  
23 may be approached by counsel at some point  
24 following this proceeding. If you wish you may  
25 speak with counsel and answer any questions that

1 they may have about their performance or about  
2 other issues. However, you are equally entitled  
3 to refuse to answer their questions or not to  
4 speak to them at all. The choice is yours. To  
5 counsel, I would simply admonish you not to ask  
6 the jurors any questions going to the  
7 deliberative process. As you know, the secrecy  
8 of those proceedings represent the hallmark of  
9 the jury system, and any questions that you must  
10 ask of the jurors should not touch upon the  
11 jury's internal deliberations. Members of the  
12 jury, as I said I would like to meet with you  
13 briefly, but you are now excused with the thanks  
14 of the court. Ms. McKinney, you may escort the  
15 jury.

16 (Jury excused at 4:51 p.m.)

17 THE COURT: Counsel, the parties, please be  
18 seated. I advise the parties that any post  
19 trial motions for judgment as a matter of law or  
20 for a new trial must be filed within 28 days of  
21 this date as required by the Federal Rules of  
22 Civil Procedure. Are there any other matters  
23 that the parties would like to address at this  
24 time?

25 MR. CROCENZI: Your Honor, would the 28 days

1 also apply for a motion for attorney's fees and  
2 costs?

3 THE COURT: That's something that -- not  
4 necessarily. In fact, that would be an issue  
5 that I thought counsel could confer and agree on  
6 a briefing schedule for. I'm happy to take it  
7 up immediately or within a reasonable period of  
8 time. I want to give you an opportunity to  
9 decompress following this lengthy trial and then  
10 present that motion. So why don't you get  
11 together and see if you can agree on an  
12 appropriate briefing schedule for that.

13 MR. CROCENZI: Thank you.

14 THE COURT: Just advise my office. If you  
15 can do it in the form of a concurred in motion  
16 that would be my preference, Mr. Crocenzi.

17 MR. CROCENZI: Okay.

18 THE COURT: All right? Any other matters?

19 MS. SALTZ: Just to clarify, Your Honor, 28  
20 days from today for a post trial?

21 THE COURT: Correct.

22 MS. SALTZ: Thank you, Your Honor.

23 THE COURT: Thank you. We are adjourned.

24 (Trial concluded at 4:53 p.m.)  
25

1       Ricky A. Shaw vs. Cumberland Truck Equipment Co.

2                       1:09-CV-00359

3                       Jury Trial Proceedings, Day 4

4                       19 May 2011

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7  
8                       I hereby certify that the proceedings  
9       and evidence are contained fully and accurately  
10      in the notes taken by me on the trial of the  
11      above case, and that this copy is a correct  
12      transcript of the same.

13  
14  
15                       s/ Wesley J. Armstrong

16                       -----

17                       Wesley J. Armstrong

18                       Registered Merit Reporter

19  
20  
21  
22                       The foregoing certification of this  
23      transcript does not apply to any reproduction by  
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25      supervision of the certifying reporter.



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